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In The Supreme Court of the United States

BEN CURRY, Warden,

Petitioner,

v.

FRANK BUTLER,

Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED

In *People* v. *Black*, 113 P.3d 534 (Cal. 2005), the California Supreme Court upheld the state's "upper term" sentencing procedure against a claim that it violated the defendant's right to a jury trial under *Blakely* v. *Washington*, 542 U.S. 296 (2004). But, in *Cunningham* v. *California*, 127 S. Ct. 856 (2007), this Court disagreed with *Black* and held the California upper-term procedure unconstitutional.

In this case, the Ninth Circuit invalidated a pre-*Cunningham* California upper-term sentence. The question presented, concerning the status of pre-*Cunningham* final sentences challenged collaterally on jury-trial grounds, is:

In light of *Teague* v. *Lane*, 489 U.S. 288 (1989), and 28 U.S.C. § 2254(d), may a federal court grant habeas relief on a California petitioner's claim that his upper-term sentence, imposed and final prior to *Cunningham*, violated his right to jury trial?

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PETITION FOR WRIT OF CERTIORARI

Ben Curry, Warden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND JUDGMENTS BELOW

The Ninth Circuit's opinion is reported at 528 F.3d 624 (9th Cir. 2008). The order of the Ninth Circuit denying rehearing and rehearing en banc, the orders of the district court and the California Supreme Court, and the opinions of the California Court of Appeal, all are unreported. The Appendix to this petition contains each of these orders and opinions.

JURISDICTION

The Court of Appeals filed its opinion on June 9, 2008. (App. B.) The Court of Appeals denied the Warden's petition for rehearing and suggestion for rehearing en banc on July 18, 2008. (App. A.) The Warden timely invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . .

The Fourteenth Amendment provides, in pertinent part

> No state . . . shall deprive any person of life, liberty, or property without due process of law . . . ."

Section 2254 of Title 28 of the United States Code provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any

> claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—[¶] resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

Section 273.5(a) of the California Penal Code provides, in pertinent part:

> Any person who willfully inflicts upon a person who is his or her spouse . . . corporal injury resulting in a traumatic condition . . . shall be punished by imprisonment . . . for two, three, or four years . . . .

Former section 1170(b) of the California Penal Code provided, in pertinent part:

> When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.

STATEMENT OF THE CASE

In 2001, Frank Butler stood behind his wife during an argument and struck her on the head "three or four times" with an iron. Her injuries, which resulted in "blood everywhere," required treatment at a hospital. (App. J102.) In 2003, a Los Angeles County jury convicted Butler of spousal battery and assault with a deadly weapon. Under California law, spousal battery carried a sentence of two, three, or four years in prison. (Cal. Penal Code § 273.5(a).) At the time of sentencing, the court could impose only the middle of these three terms unless an aggravating or mitigating circumstance was present. (Former Cal. Penal Code § 1170(b).) In imposing sentence, the trial court selected the "upper term" of four years for the spousal battery, citing as aggravating circumstances the

facts that the victim was extremely vulnerable and that Butler was on probation at the time of the offense. (App. B.)

In June 2004, in *Blakely* v. *Washington*, 542 U.S. 296 (2004), this Court invalidated Washington's procedure for imposing exceptional sentences on the ground that it violated Blakely's Sixth Amendment right to jury trial. *Id.* at 303-05. Subsequently, in *People* v. *Black*, 113 P.3d 534 (Cal. 2005) (*Black I*), the California Supreme Court upheld California's procedure for imposing upper terms against a *Blakely* challenge. *Id.* at 542-43. In September 2005, under *Black I*, the California Court of Appeal on direct review rejected Butler's claim that his upper-term sentence violated *Blakely*. (App. H.)

In December 2006, Butler challenged his upper-term sentence in a federal habeas petition. A month later, in January 2007, this Court decided *Cunningham* v. *California*, 127 S. Ct. 856 (2007), disagreeing with *Black I* and holding that Cunningham's upper-term sentence violated his right to jury trial. In response to *Cunningham*, the California Legislature amended California Penal Code section 1170(b) to eliminate the requirement that the sentencing court find an additional fact in order to impose an upper or lower term. Subsequently, the California Supreme Court judicially adopted this remedy as to resentencings after *Cunningham* reversals. *People* v. *Sandoval*, 161 P.3d 1146, 1157-64 (Cal. 2007).

In July 2007, the district court in this case found, under *Cunningham*, that Butler's upper-term sentence violated the right to jury trial, and granted the writ. (Apps. C, D, E, F, G.) Butler appealed. The Ninth Circuit in a published opinion affirmed in part, vacated in part, and remanded for further proceedings. The Ninth Circuit held that *Cunningham* had not announced a "new rule" under

the *Teague* anti-retroactivity doctrine; the panel thus applied it to upset petitioner's pre-*Cunningham* final judgment. The Ninth Circuit also held that the state court's determination that California's upper-term procedure complied with the Sixth Amendment was "contrary to" clearly established Supreme Court authority under the deferential habeas corpus review standard of 28 U.S.C. § 2254(d). The panel remanded the case to the district court for an evidentiary hearing on whether the error was harmless. (App. B.)

REASONS FOR GRANTING THE PETITION

THE NINTH CIRCUIT'S HOLDING THAT *CUNNINGHAM* MUST BE APPLIED RETROACTIVELY TO FINAL JUDGMENTS CONFLICTS WITH THE PROPER RESOLUTION OF THE ISSUE BY OTHER COURTS AND AFFECTS HUNDREDS OF CASES

After *Blakely*, but before *Cunningham*, the state supreme courts in California, New Mexico, Tennessee, and Hawaii rejected jury-trial challenges to their sentencing systems. Each of these state supreme courts favorably compared its system to the remedial system approved by this Court in *United States* v. *Booker*, 543 U.S. 220 (2005), to rectify *Blakely* jury-trial infirmities in the federal sentencing scheme.

The *Cunningham* majority, it is true, disagreed with the California Supreme Court's *Black I* ruling that California's former upper-term system was constitutional. Nevertheless, three dissenting Justices of this Court employed an analysis closely resembling the approach of the supreme courts of California, New Mexico, and Tennessee, and maintained that the Court should have upheld California's sentencing system. *Cunningham*, 127

S. Ct. at 873-81 (Alito, J., dissenting); see also *id.* at 872-73 (Kennedy, J., dissenting) (additionally drawing the same offense/offender distinction that the Hawaii Supreme Court had made).

In light of the reasonable and substantial disagreement about whether the *Blakely* rule invalidated a system like California's, the lower courts had almost unanimously held, under *Teague v. Lane*, 489 U.S. 288 (1989), that reasonable jurists could have disagreed about whether California's former system was valid prior to *Cunningham*, and that *Cunningham* therefore could not be applied retroactively on habeas to final convictions. These courts include those directly affected by *Cunningham*, including the New Mexico Supreme Court, the California Court of Appeal, and several United States district courts in California and Tennessee. See *State* v. *Frawley*, 172 P.3d 144, 154 (N.M. 2007); *Loher* v. *State*, 2008 WL 2721179, *15 n.17 (No. 27644, Haw. Ct. App., Jul. 14, 2008) (citing numerous cases and noting that the Ninth Circuit "appears to have disagreed with nearly every other court that has considered the issue to date").

The Ninth Circuit, almost alone, expressed a different view in this case. The Ninth Circuit—although correctly noting how this Court ultimately decided *Cunningham*—incorrectly held that the state court's ruling in this case was "contrary" to "clearly established" pre-*Cunningham* law of this Court and that no reasonable jurist could have disagreed. (App. B11-B25.) The Ninth Circuit erred by failing to recognize that it was at least *reasonable* for a pre-*Cunningham* state court to hold that California's system complied with the Constitution—even though that view eventually was later rejected as incorrect in *Cunningham*. By applying *Cunningham* retroactively to all upper-term cases back to *Blakely*, the Ninth Circuit's rule improperly forces the re-litigation of hundreds of

additional convictions on habeas corpus, resulting in many resentencings.

A. The Ninth Circuit's Decision Burdens Courts And The States By Requiring Re-Litigation Of Hundreds Of Additional *Cunningham* Upper-Term Sentences.

By declaring *Cunningham* retroactive back to *Blakely*, the Ninth Circuit has opened the floodgates to relitigating more than two-and-a-half years' worth of California upper-term sentences that became final between June 24, 2004, the date of *Blakely*, and January 23, 2007, the date of *Cunningham*. See www.westlaw.com (listing 2,606 appellate opinions in the California state courts in a search for "*Blakely* v. *Washington*" before January 23, 2007, and 488 opinions thus far in the lower federal courts in a search for "*Cunningham* v. *California*"). This case is an example of the additional time and resources the Ninth Circuit's decision will cause to be expended. After making a binding determination about the retroactivity issue, the Ninth Circuit ordered the district court to hold a hearing on harmless error.

Other states will be similarly affected, with practical burdens that are difficult to forecast. The Ninth Circuit's decision will affect those sentences that the Hawaii state courts had found *Blakely*-compliant but that later were found to violate *Cunningham*. The effect also may be felt in New Mexico, for the Ninth Circuit's retroactivity holding conflicts with that of the New Mexico Supreme Court.

It is true that, in most of the re-sentencings that will be required in California, the petitioners likely will again receive the same upper-term sentences—based this time on the reformed sentencing system set forth by the California Supreme Court after *Cunningham*. See *People* v. *Sandoval*, 161 P.3d 1146, 1158-64 (Cal. 2007) ("It seems

likely that in all but the rarest of cases the level of discretion afforded the trial court under the Attorney General's proposal [adopted by the California Supreme Court] would lead to the same sentence as that which would have been imposed under the DSL as initially enacted."). But that hardly mitigates the expense that the Ninth Circuit's retroactivity holding saddles the State and state courts with.

The prospect of many expensive re-sentencing proceedings is exacerbated, moreover, by the Ninth Circuit's narrow view of this Court's recognized *Almendarez-Torres* rule exempting from the scope of the jury-trial right aggravated sentences based on a judicial finding of recidivism. See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 226, 230-31, 238-47 (1998). The Ninth Circuit takes a narrow view of this exception, limiting it to findings of prior convictions only, as opposed to findings that the defendant's prior convictions were serious or that the defendant committed the new crime while on probation. (App. B31-B38.) The Ninth Circuit's view sharply contrasts with the California Supreme Court's broader view. See *People* v. *Towne*, 186 P.3d 10, 17-20 (Cal. 2008) (listing the majority of federal and state courts that have disagreed with the Ninth Circuit's interpretation); App. B29-B38.

The Warden notes that the issue of whether *Cunningham* will operate retroactively in state habeas corpus proceedings to judgments becoming final before *Cunningham* but after *Blakely* is currently pending and fully briefed in the California Supreme Court. See *In re Gomez*, 64 Cal. Rptr. 3d 281, 284-85 (Cal. Ct. App. 2007), *petition for review granted*, 169 P.3d 887 (Cal. Oct. 24, 2007) (No. S155425). The state supreme court's decision will affect a large number of such state habeas cases. It is unknown whether the California Supreme Court will apply

Teague or some other retroactivity test, and it is unknown how the *Cunningham* ruling would be treated under any test adopted by the state court. See *Danforth* v. *Minnesota*, 128 S. Ct. 1029, 1038-42 (2008) (unlike federal courts, state courts are free to apply a retroactivity test other than *Teague*). But for the California Supreme Court to apply *Cunningham* retroactively under *Teague* would require it to condemn its own *Black I* holding as not merely wrong but so clearly wrong that no reasonable jurist could have disagreed with it.

Even if the California Supreme Court were to decide that *Cunningham* is retroactive under *Teague*, or under another test, the Ninth Circuit's opinion in this case will still affect hundreds of federal habeas cases. In these cases, the Ninth Circuit will frequently grant relief where the California state courts did not, due to their disparate interpretations of the recidivism exception.

B. The Retroactivity Question Is An Important Question, As Evidenced By This Court's Aborted Grant Of Certiorari In *Burton* v. *Waddington*.

Granting certiorari in this case would also give this Court an opportunity to consider an important issue closely related to the one that previously evaded review because of a procedural impediment. This Court previously granted certiorari on whether *Blakely* should be applied retroactively under *Teague*. *Burton* v. *Waddington*, 547 U.S. 1178 (2006). But the Court had to dismiss review of that case because it involved a unauthorized successive habeas petition under 28 U.S.C. § 2244(b). *Burton* v. *Stewart*, 127 S. Ct. 793, 794 (2007) (per curiam).

Although a smaller (but still very large) group of cases is implicated by the question presented in this case—roughly speaking, sentences meted out after *Blakely* but before *Cunningham*—the retroactivity issue still merits certiorari

review. In view of the strong lower court consensus that *Blakely* is not retroactive under *Teague*, and the growing consensus that *Cunningham* is not retroactive either, the Ninth Circuit's conclusion sharply conflicts with the New Mexico Supreme Court and other lower courts.

Unlike the situation in *Burton*, no procedural defect is present in this case, as the Ninth Circuit fully resolved the *Teague* and § 2254(d) issues. Further, the Ninth Circuit's remand for an evidentiary hearing in this case can have no effect on these threshold decisions. See 28 U.S.C. § 1254(1).

C. The Ninth Circuit's Published Decision Is Erroneous Under Both *Teague* v. *Lane* And 28 U.S.C. § 2254(d).

The Ninth Circuit erroneously held that the California Supreme Court's decision in *Black I* was "contrary to clearly-established law" and did not qualify for protection as part of the class of "good-faith interpretations of existing precedents made by state courts" defined in *Teague*. (App. B11-B25; see *Butler* v. *McKellar*, 494 U.S. 407, 414 (1990).)

Under *Teague*, a new rule of constitutional law cannot be applied retroactively on federal collateral review to upset a state conviction or sentence unless the new rule forbids criminal punishment of primary, individual conduct or is a "watershed" rule of criminal procedure. *Caspari* v. *Bohlen*, 510 U.S. 383, 396 (1994). A rule is new under *Teague* where "reasonable jurists . . . 'would [not] have deemed themselves compelled to accept [the petitioner's] claim'" when his conviction became final. *Johnson* v. *Texas*, 509 U.S. 350, 366 (1993). This Court has vigorously enforced the *Teague* new rule principle in a variety of contexts and has hardly ever found a rule to be "old" for habeas corpus

purposes.[1]

Such rare "old rules" under *Teague* are similar to the "clearly established Federal law" that restricts federal habeas corpus relief under § 2254(d). See *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000). For example, in *Carey* v. *Musladin*, 127 U.S. 649, 653-54 (2006), this Court recently explained that a federal court erroneously grants habeas relief if it applies a Supreme Court precedent to a new context. *Id.* at 653-54 (Supreme Court's prejudice test for state-sponsored courtroom practices did not create clearly established Supreme Court law regarding private-actor courtroom conduct).

A survey of the legal landscape at the time Butler's conviction became final and when the state courts last resolved his claims—in 2005, after *Blakely* and *Booker* but before *Cunningham*—demonstrates that a reasonable state judge could have discerned material distinctions between the California system at issue in *Cunningham* and the sentencing schemes at issue in *Booker*, *Blakely*, and *Apprendi*, and could have rejected Butler's claim based on those differences. Under *Teague* and § 2254(d), then, the Ninth Circuit should not have used its own interpretation

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1. See *Whorton* v. *Bockting*, 127 S. Ct. 1173, 1182 (2007); *Beard* v. *Banks*, 542 U.S. 406, 414 (2004); *Schriro* v. *Summerlin*, 542 U.S. 348, 352-53 (2004); *Stewart* v. *LaGrand*, 526 U.S. 115, 119 (1999); *Breard* v. *Greene*, 523 U.S. 371, 377 (1998); *O'Dell* v. *Netherland*, 521 U.S. 151, 160 (1997); *Lambrix* v. *Singletary*, 520 U.S. 518, 528 (1997); *Gray* v. *Netherland*, 518 U.S. 152, 169-70 (1996); *Goeke* v. *Branch*, 514 U.S. 115, 118-21 (1995); *Caspari* v. *Bohlen*, 510 U.S. 383, 393 (1994); *Gilmore* v. *Taylor*, 508 U.S. 333, 344 (1993); *Graham* v. *Collins*, 506 U.S. 461, 468 (1993); *Sawyer* v. *Smith*, 497 U.S. 227, 234 (1990); *Butler* v. *McKellar*, 494 U.S. 407, 415 (1990); *Saffle* v. *Parks*, 494 U.S. 484, 494 (1990); *Teague*, 489 U.S. at 301; but see *Bousley* v. *United States*, 523 U.S. 614, 619-21 (1998); *Stringer* v. *Black*, 503 U.S. 222, 229 (1992); *Penry* v. *Lynaugh*, 492 U.S. 302, 315 (1989), *abrogated on another ground*, *Atkins* v. *Virginia*, 536 U.S. 304, 321 (2002).

of the law set out in those cases to grant Butler relief.

In each of these three earlier cases, the defendant received punishment *above* the upper-most point of the initial prescribed sentencing range for the crime, based on a fact not found by the jury. *Booker*, 543 U.S. at 226-37; *Blakely*, 542 U.S. at 298-305, 308-09; *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). By contrast, the *Cunningham* majority found that the right to jury trial was violated even in a system like California's, where the trial court imposes an upper term *within* an initial prescribed sentencing range for the crime (lower, middle, and upper term), based on a fact not found by a jury. See *Cunningham*, 127 S. Ct. at 869. Because the upper term was within the initial range that the criminal statute specified, however, Justice Alito (joined by Justices Breyer and Kennedy)—like the California state courts dealing with Butler's claim—reasonably found that the upper term was based on the facts reflected in the jury verdict, even though the trial court made additional factual findings in selecting a sentence within that range. *Cunningham*, 127 S. Ct. at 873-81 (Alito, J., dissenting); see *Booker*, 543 U.S. at 233 ("For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."); *Blakely*, 542 U.S. at 303 ("the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."); see also *Booker*, 543 U.S. at 278 (Stevens, J., dissenting from the remedy) (giving an example complying with *Blakely* where a sentencing court in its discretion "relies upon factual determinations beyond the facts found by the jury" to sentence within "the defendant's initial sentencing range").

Moreover, as Justice Alito explained, there was a sound comparison between the "remedial" system found to be constitutional in *Booker* and the California system challenged in *Cunningham*:

> The California sentencing law that the Court strikes down today is indistinguishable in any constitutionally significant respect from the advisory Guidelines scheme that the Court approved in *United States* v. *Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Both sentencing schemes grant trial judges considerable discretion in sentencing; both subject the exercise of that discretion to appellate review for "reasonableness"; and both—the California law explicitly, and the federal scheme implicitly—require a sentencing judge to find some factor to justify a sentence above the minimum that could be imposed based solely on the jury's verdict. Because this Court has held unequivocally that the post-*Booker* federal sentencing system satisfies the requirements of the Sixth Amendment, the same should be true with regard to the California system.

Cunningham, 127 S. Ct. at 873 (Alito, J., dissenting).

Indeed, in a post-*Cunningham* Supreme Court concurring opinion, two members of the *majority* in *Cunningham*—Justices Scalia and Thomas—affirmed the validity of Justice Alito's comparison between the California system and post-*Booker* federal system:

> Under the scheme promulgated today, some sentences reversed as excessive will be legally authorized in later cases only because additional judge-found facts are present; and, *as Justice Alito argued in Cunningham*, some lengthy sentences will be affirmed (*i.e.*, held lawful) only because of the presence of aggravating facts, not found by the jury, that distinguish the case from the mine-run.

Rita v. *United States*, 127 S. Ct. 2456, 2475-76 (2007) (Scalia, J., concurring) (italics added).

There is further evidence that *Blakely* had not "clearly established," or "dictated" to "all reasonable jurists," that the California system was constitutionally infirm. The California Supreme Court and two other state supreme courts addressing sentences of a similar type—requiring a fact to impose a higher sentence *within* the initial prescribed range—had also rejected *Blakely* challenges on the basis of this distinguishing characteristic, also analogizing their systems to the *Booker* remedial system. *Black I*, 113 P.3d at 543, *judgment vacated and remanded in light of Cunningham*, 127 S. Ct. 1210 (2007), *opinion on remand*, 161 P.3d 1130 (Cal. 2007) (*Black II*); *State* v. *Lopez*, 123 P.3d 754, 761-68 (N.M. 2005), *overruled in light of Cunningham*, *State* v. *Frawley*, 172 P.3d 144, 152-53 (N.M. 2007); *State* v. *Gomez*, 163 S.W.3d 632, 661-62 (Tenn. 2005), *judgment vacated and remanded in light of Cunningham*, 127 S. Ct. 1209 (2007), *opinion on remand*, 239 S.W.3d 733 (Tenn. 2007); see also *State* v. *Maugaotega*, 114 P.3d 905, 916 (Haw. 2005) (distinguishing Hawaii's system from *Blakely* based on the intrinsic/extrinsic (i.e., offense/offender) reasoning that Justice Kennedy later articulated in his separate dissent in *Cunningham*), *judgment vacated and remanded in light of Cunningham*, 127 S. Ct. 1210 (2007), *opinion on remand*, 168 P.3d 562 (Haw. 2007). These cases show that the issue presented in *Cunningham* was unsettled, to say the least, and it seems likely that this Court granted certiorari in *Cunningham*, at least in part, because of the lack of national uniformity on this issue. *Cunningham*, certainly, was no per curiam decision. And three justices reasonably dissented.

Further, this Court has proscribed the retroactive application of a constitutional rule regarding one state's sentencing law to another state's sentencing law where

there were arguable legal distinctions between these laws. In *Lambrix* v. *Singletary*, 520 U.S. 518, 527-39 (1997), this Court held that its cases repeatedly prohibiting the jury's consideration of invalid sentencing factors, in the capital sentencing systems of Mississippi, Oklahoma, and Georgia, could not apply retroactively to Florida's system. The Court determined that—even though it ultimately had decided in *Espinosa v. Florida*, 505 U.S. 1079 (1992), that the Florida system was unconstitutional—*Espinosa* stated a new rule because a court "could reasonably have reached a conclusion contrary to our holding in that case." *Lambrix*, 520 U.S. at 538. Just as *Espinosa* was not necessarily dictated by this Court's prior precedent, the *Cunningham* decision was not compelled by the Court's prior precedent. See also *O'Dell* v. *Netherland*, 521 U.S. 151, 161, 165 (1997).

Nor does language in the *Cunningham* majority opinion finding California's system "functionally indistinguishable" from the system at issue in *Blakely*, and sharply criticizing opposing arguments, foreclose a determination that, before *Cunningham*, it was reasonable to uphold California's system under *Blakely* and *Booker*. See, e.g., *Cunningham*, 127 S. Ct. at 868-70 & n.15. On the contrary, this Court has emphasized that language in an opinion suggesting that prior precedent controlled the result does not preclude finding that the opinion introduces a new rule. See *Butler v. McKellar*, 494 U.S. at 415 (finding *Miranda* case of *Arizona* v. *Roberson*, 486 U.S. 675 (1988), to be a new rule under *Teague*, despite the *Roberson* majority's conclusion that it was "directly controlled" by prior precedent, reasoning that "[c]ourts frequently view their decisions as being 'controlled' or 'governed' by prior opinions even when aware of reasonable contrary conclusions reached by other courts"); see also *O'Dell*, 521 U.S. at 157-66 (finding *Simmons* v. *South Carolina*, 512 U.S. 154, 162, 164-65

(1994) to state a new *Teague* rule notwithstanding dismissive language in the *Simmons* opinion on direct appeal); *Beard* v. *Banks*, 542 U.S. 406, 413-16 (2004) (same as to *Mills* v. *Maryland*, 486 U.S. 367, 374-75, 377 n.10, 379 n.11, 381, 384 (1988)). In short, the *Cunningham* majority opinion was a lengthy and detailed analysis that aimed to present a definitive resolution of a question that had generated considerable controversy and conflict in the lower courts.

The Ninth Circuit should have rejected Butler's claim that *Cunningham* applies retroactively to cases final after *Blakely* because the California Supreme Court's decision to the contrary was a reasonable application of *Apprendi*, *Blakely*, and *Booker*. The Ninth Circuit's published decision conflicts with virtually every other lower court decision on the issue. It contradicts this Court's *Teague* precedents and it exceeds the limited authority of federal courts to grant habeas relief under § 2254(d)(1). It should not stand uncorrected.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Dated: October 16, 2008

Respectfully submitted,

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APPENDIX A

FILED
JUL 18 2008
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK BUTLER, Petitioner - Appellee, v. BEN CURRY, Respondent - Appellant.	No. 07-56204 D.C. No. CV-06-07576-JVS(RNB) Central District of California, Los Angeles ORDER

Before: HALL, GRABER, and BERZON, Circuit Judges.

The panel has unanimously voted to deny appellant's petition for rehearing. Judge Graber and Judge Berzon have voted to deny the petition for rehearing en banc. Judge Hall recommends denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK BUTLER, *Petitioner - Appellee,* v. BEN CURRY, *Respondent - Appellant.*	No. 07-56204 D.C. No. CV-06-07576- JVS(RNB) OPINION

Appeal from the United States District Court
for the Central District of California
Honorable James V. Selna, District Judge, Presiding

Argued and Submitted
February 4, 2008—Pasadena, California

Filed June 9, 2008

Before: Cynthia Holcomb Hall, Susan P. Graber,
Marsha S. Berzon, Circuit Judges.

Opinion by Judge Berzon

COUNSEL

Davina T. Chen, Deputy Federal Public Defender, Los Angeles, California, for the petitioner.

William H. Shin, Deputy Attorney General, Los Angeles, California, for the respondent.

OPINION

BERZON, Circuit Judge:

Frank Butler alleged in his petition for writ of habeas corpus that his Sixth Amendment rights were violated when the California state trial court imposed an "upper term" sentence based on two aggravating factors not proved to a jury beyond a reasonable doubt. The district court, relying on *Cunningham v. California*, 127 S. Ct. 856 (2007), agreed, and granted the writ. The State contends that *Cunningham*, which struck down California's determinate sentencing law ("DSL"), announced a "new rule" that cannot be applied on collateral review. In the alternative, the State maintains that the requirements for habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") have not been met, and that, even if they were, there was no constitutional violation.

We conclude that the result in *Cunningham* was clearly dictated by the Supreme Court's Sixth Amendment case law, in particular by *Blakely v. Washington*, 542 U.S. 296 (2004), decided before Butler's conviction became final. The state court decision in Butler's case was contrary to this clearly established law. Further, Butler's constitutional rights were violated when the statutory maximum for his crime was increased on the basis of facts found by a judge by a preponderance of the evidence, rather than admitted or found by a jury beyond a reasonable doubt. We cannot, however, determine whether this violation was harmless in the absence of further factfinding about what evidence was presented to the state trial court judge in support of the allegation that Butler was on probation at the time of his crime. For that reason, we remand to the district court for an evidentiary hearing.

I. Background.

A. Trial.

Frank Butler was tried in California state court for an assault on his former wife, Daria Butler. At trial, the Butlers provided conflicting accounts of the assault. The judge's finding with regard to one of the aggravating factors turned, to some degree, on whose story was believed.

1. Daria testified:

She and Butler married in 1989 and had two children together, Barbara and Laquan, prior to their divorce in 1993. Her fights with Butler had been physical in the past, and she had hit him on more than one occasion. Daria had obtained at least three restraining orders against Butler, and she and Butler had repeatedly ended their relationship. In the summer of 2000, they reconciled once again, and Daria drove to St. Louis to pick up Butler and bring him back to California. Several months after Butler's return to California, Daria and Butler separated once more, and Daria obtained a restraining order against Butler, still in place at the time of the June 28, 2001 incident. The Butlers reconciled yet again in January or February of 2001 and were living together, with their two children, at the time of the assault.

In 1977, Daria was in an abusive relationship with a different boyfriend. She obtained a gun and asked her boyfriend to meet her in an alley, where she shot and seriously injured him. At that time, she "didn't have any knowledge of shelters or restraining orders or anything."

On the evening of June 28, 2001, Daria and Butler had a dispute about a letter she had received from another ex-husband asking for help. Butler left the room; Daria "could tell that he was kind of getting upset." Later in the

evening, Daria tried to talk with Butler in their bedroom, but he left the room, slamming the door behind him. Daria decided to sleep in the downstairs office, but soon after she had gotten into bed downstairs, Butler entered the office and began yelling at her about her ex-husband. He then turned and left the room.

Soon thereafter, Daria decided to return to the bedroom, and Butler followed her there, "cursing and screaming" at her. Daria retrieved Butler's suitcase from the bedroom closet; as she turned and placed it on the bed, she felt a blow to the back of her head and "the blows kept coming." At some point during the attack, Daria realized that she was being hit with an iron. The attack left "blood spattered all across the room for several feet on the walls, the door," and the fan.

Daria began screaming for her children. Laquan testified that when he responded to his mother's screams, he found his mother on the floor of the bedroom crying and "bleeding in the back of her head." The police arrived shortly thereafter, and Daria was taken to the hospital, where she received six to eight staples in the back of her head. Deputy Calvo, the sheriff's deputy assigned to investigate the case, confirmed that when he arrived at the scene he found a shattered iron.

2. Butler testified:

Daria was the one who had instigated physical confrontations in their relationship, attacking and slapping him during marriage counseling sessions, and throwing things at him during arguments. At one point several months before the incident in question, Daria bit him on the chest after an argument.

After Daria told him about the letter from her ex-husband, he responded that she should tell her ex-husband that she could not help him because she was with Butler

now. Daria became visibly angry. Butler attempted several times throughout the evening to speak with her, but she refused to have a conversation with him. After his final attempt to speak with her in the downstairs office, he concluded that it was better if he simply left, so he went upstairs to pack. Daria followed him upstairs to the bedroom, and he saw that she had a knife in her left hand. She came at him with the knife, and he grabbed the iron from his closet and hit her with it until she dropped the knife. Laquan, Barbara, and Deputy Calvo all testified that they did not see a knife in the bedroom after the attack.

3. The jury found Butler guilty of corporal injury to a spouse (Cal. Penal Code § 273.5(a) (2001))[1] and assault with a deadly weapon or by means of force likely to produce great bodily injury (Cal. Penal Code § 245(a)(1) (2000)).[2] The jury also found as "enhancements" that

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1. Cal. Penal Code § 273.5(a) provides:

> Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars ($6,000) or by both that fine and imprisonment.

2. Cal. Penal Code § 245(a)(1) provides:

> Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment.

Butler used a deadly and dangerous weapon and that he inflicted great bodily injury during the commission of the crime. *See* Cal. Penal Code §§ 12022(b)(1) (2003),[3] 12022.7(a) (2003).[4]

B. Sentencing.

Under California's DSL as it existed at the time Butler was sentenced, "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime."[5] Cal. Penal Code § 1170(b) (2005). The California

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3. Cal. Penal Code § 12022(b)(1) provides:

> Any person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense.

4. Cal. Penal Code § 12022.7(a) provides:

> Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years.

5. Section 1170 of the California Penal Code was amended in January 2005 and again in March of 2007. *See* Cal. Penal Code § 1170 (2005) and Cal. Penal Code § 1170 (2007). The relevant language in section 1170(b) remained unchanged in the version that was passed in January 2005. In contrast, the version that became effective on March 30, 2007, passed in response to *Cunningham*, provides that: "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court." Cal. Penal Code § 1170(b) (2007). All references to section 1170(b) are to the 2005 version — which was in effect at the time Butler's conviction became

Rules of Court ("Rules") effective at the time of Butler's sentencing[6] also provided that "[t]he middle term must be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation." Cal. R. Ct. 4.420(a) (1977). Under the Rules, "[c]ircumstances in aggravation and mitigation must be established by a preponderance of the evidence," and "[s]election of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." Rule 4.420(b). The Rules also specify a non-exhaustive list of aggravating and mitigating factors, including factors relating to the crime and factors relating to the defendant. *See* Cal. R. Ct. 4.421, 4.423. Both the crimes of which Butler was convicted specify three possible terms, so his sentencing was governed by section 1170(b). *See* Cal. Penal Code §§ 273.5(a), 245(a)(1).

At Butler's sentencing, the court indicated that it had "read and considered the probation report in this case." The court then found that although Butler had one prior misdemeanor offense, his lack of a significant prior record was a factor in mitigation. The court noted that "on the other side of the coin are factors in aggravation": "the vulnerability of the victim with her back turned to the defendant when she was attacked from behind" and "the fact that [Butler] was on probation at the time the crime was committed."

Butler's counsel objected to the use of Butler's probationary status as an aggravating factor, arguing that "there is no indication that he was noncompliant except for

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final in November 2005 — unless otherwise specified.

6. Rule 4.420 was amended substantially on May 23, 2007 in response to *Cunningham*. *See* Cal. R. Ct. 4.420 (2007). All references are to the previous version in effect in November 2005 when Butler's conviction became final unless otherwise specified.

this." The court rejected this argument, and went on to conclude that the aggravating factors "outweigh the factor in mitigation." Based on these findings, the court imposed the upper term of four years in state prison for corporal injury to a spouse. The court then also imposed sentences of one year and three years, respectively, for the use of a deadly weapon and the infliction of serious bodily injury enhancements, for a total of eight years in state prison. On count two, assault with a deadly weapon, the court imposed the middle term of three years as well as the three-year enhancement for causing serious bodily injury, but stayed imposition of the sentence.

C. State Direct Appeals and Post-Conviction Relief.

On direct appeal, Butler raised a Sixth Amendment challenge to the imposition of an upper term sentence based on facts found by a judge by a preponderance of the evidence, rather than by a jury beyond a reasonable doubt. The California Court of Appeal initially held, on September 22, 2004, that Butler's "sentence was erroneous under compulsion of *Blakely v. Washington*[, 542 U.S. 296 (2004),]" because "[t]he court imposed the high term . . . based on factual findings it made without a jury."

Shortly before the California Court of Appeal's first decision on Butler's direct appeal, the California Supreme Court had decided *People v. Black*, 35 Cal. 4th 1238 (2005) ("*Black I*"), in which it held that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence . . . under California law does not implicate a defendant's Sixth Amendment right to a jury trial." *Id.* at 1244. The California Supreme Court granted review of the Court of Appeal's initial decision in Butler's case and remanded with directions to vacate and reconsider the appeal in light of *Black I*. On September 28, 2005, the Court of Appeals reconsidered its earlier ruling and held that Butler's sentence did not violate the Sixth Amendment. Butler did not appeal the Court of Appeal's

second decision, but did file a petition for state post-conviction relief in the California Supreme Court, which was denied on the merits without comment or citation.

D. District Court Proceedings.

In December 2006, Butler filed a petition for writ of habeas corpus in federal district court, maintaining that his sentence violated *Blakely*. Shortly thereafter, in January 2007, the Supreme Court decided *Cunningham*. *Cunningham* addressed a challenge to California's DSL and concluded that "the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum" for purposes of analysis under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). 127 S. Ct. at 868. Because "the DSL authorize[d] the judge, not the jury, to find the facts permitting an upper term sentence," it violated the Sixth Amendment. *Id.* at 871.

[1] The State responded to Butler's petition by filing a motion to dismiss, arguing that Butler's claim of sentencing error was unexhausted. The State contended that, "because the recent *Cunningham* decision casts petitioner's [claim] in a significantly different light, his petition should be dismissed and proceedings stayed while petitioner returns to state court to seek relief under *Cunningham*."

The magistrate judge recommended that the district court deny the state's motion because *Cunningham* "did not effect an intervening change in federal law." In its objections to the magistrate judge's recommendation, the State argued for the first time that *Cunningham* constitutes a "new rule of constitutional law" within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989). The district court adopted the magistrate judge's recommendation and denied the motion to dismiss, holding, *inter alia*, that the State's "*Teague* argument fails."

Having failed in its effort at dismissal, the State filed an answer to the first amended petition on May 16, 2007, in which it maintained that granting relief to petitioner would violate *Teague*. Moreover, the State argued, the California Court of Appeal and the California Supreme Court's decisions did not unreasonably apply "clearly established" Supreme Court precedent because Butler's probation status falls within the "recidivism" exception to *Apprendi v. New Jersey* and, under California's DSL, a trial court's finding of a single aggravating factor is sufficient to render a defendant eligible for the upper term. The State further contended that any error was harmless because the jury would have found the two aggravating factors beyond a reasonable doubt. Butler filed a traverse in response, contesting each of the State's arguments.

The magistrate judge recommended that the district court grant a conditional writ of habeas corpus. The magistrate judge determined that the failure to obtain a jury verdict on the probation aggravating factor was harmless, but that the state had not met its burden of demonstrating harmlessness with regard to the "vulnerability of the victim" finding. The district court adopted the magistrate judge's recommendation and granted a conditional writ of habeas corpus.

II. Analysis.

A. Retroactivity.

In *Cunningham*, the Supreme Court addressed a Sixth Amendment challenge to California's DSL. The petitioner in *Cunningham* was convicted of "continuous sexual abuse of a child under the age of 14." 127 S. Ct. at 860. That crime, like the crimes of which Butler was convicted, was punishable under California law by a lower, middle, or upper term. *Id.* Finding several aggravating factors, the judge imposed an upper term. *Id.* Observing that, under Cal. Penal Code § 1170(b) (2005), the judge was

required to impose a middle term sentence unless he found one or more aggravating factors, the Court held:

> In accord with *Blakely*, . . . the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum. Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, the DSL violates *Apprendi*'s bright-line rule: Except for a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Id. at 868 (internal quotation marks and citations omitted). California's DSL thus "violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." *Id.* at 860.

The State argues that the Supreme Court's holding in *Cunningham* — that California's DSL violates the Sixth Amendment because it raises the statutory maximum based on facts found by a judge, rather than a jury — is a "new rule" of constitutional law and therefore cannot be applied retroactively on collateral review under *Teague v. Lane*.[7] When a State raises the issue of retroactivity, "federal habeas courts *must* apply *Teague* before considering the merits" of a claim. *Beard v. Banks*, 542 U.S. 406, 412 (2004) (emphasis in original) (internal quotation marks omitted). We therefore address the *Teague* argument first.

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7. *Teague* was a plurality opinion, but the *Teague* rule was adopted by a majority of the Court shortly thereafter in *Penry v. Lynaugh*, 492 U.S. 302 (1989). *See Danforth v. Minnesota*, 128 S. Ct. 1029, 1033 n.1 (2008).

Under *Teague*, "old" rules of criminal procedure apply "both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review." *Whorton v. Bockting*, 127 S. Ct. 1173, 1180 (2007). Butler's conviction became final on November 7, 2005, when the time for seeking direct review of the California Court of Appeal decision in his case expired. *See Caspari v. Bohlen*, 510 U.S. 383, 390 (1994); Cal. R. Ct. 24(a), 28(b), 45(a). The decision in *Cunningham* is thus a "new rule" that cannot be applied to Butler's habeas petition if "the result was not *dictated* by precedent" as of November 7, 2005. *Teague v. Lane*, 489 U.S. at 301 (emphasis in original).[8] The "new rule" principle "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler v. McKellar*, 494 U.S. 407, 414 (1990).

To determine whether precedent dictated the holding that California's DSL is inconsistent with the Sixth Amendment, we must "ascertain the legal landscape as it . . . existed [before November 7, 2005] and ask whether the Constitution, as interpreted by the precedent then existing, compel[led] the rule." *Beard*, 542 U.S. at 411 (citation and internal quotation marks omitted); *see also Teague*, 489 U.S. at 301 ("[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government."). *Teague* does not, however, require a habeas petitioner to show that "the Supreme Court ha[s] decided a case involving identical facts, circumstances, and legal issues." *See Keating v. Hood*, 191 F.3d 1053, 1061 n.11 (9th Cir. 1999), *overruled in*

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8. A new rule may be applied on collateral review if it places certain primary conduct beyond the reach of the criminal law, or constitutes a "watershed" rule of criminal procedure "implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495 (1990). Butler does not argue that either of these two exceptions applies, and we do not address them.

part on other grounds by Payton v. Woodford, 346 F.3d 1204, 1216 (9th Cir. 2003). Rather, when a general rule must be applied in a new situation, "it can hardly be thought to have created a new principle of constitutional law." *Tanner v. McDaniel*, 493 F.3d 1135, 1144 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 722 (2007).[9] In particular, in the context of applying rules of constitutional law to statutory schemes from different states, we have noted that "applying existing constitutional rules to different state sentencing schemes d[oes] not implicate *Teague*." *Beardslee v. Brown*, 393 F.3d 1032, 1040 (9th Cir. 2004) (citing *Stringer v. Black*, 503 U.S. 222, 229 (1992) (holding that the Supreme Court's conclusion that California's death penalty statute was a "weighing" statute, where the definition of "weighing" had been established in a case involving a Mississippi statute, was not a new rule)).

[2] Looking at the legal developments prior to *Cunningham*, we conclude that the Supreme Court's Sixth Amendment case law at the time Butler's conviction became final compelled the conclusion that California's

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9. Butler argues that we need not decide whether *Cunningham* announced a "new rule" because his "petition relies not on *Cunningham*, but on his rights to proof beyond a reasonable doubt and jury trial as established by *Apprendi*, *Blakely*, and [*United States v.*] *Booker*[, 543 U.S. 220 (2005)]." This distinction is irrelevant to our task: Whether Butler asks us to apply to him a Supreme Court decision issued after his conviction became final, or to announce independently the very holding that the Supreme Court arrived at in a case decided after his conviction became final, we must determine whether the result he requests was "dictated" by precedent before his conviction was final. *See Caspari v. Bohlen*, 510 U.S. 383, 395-96 (1994) (determining whether the result that the petitioner was arguing for in his collateral review proceeding would require creation of a new rule in violation of *Teague*). The pivotal question is thus the same either way: did *Apprendi*, *Blakely*, and *Booker* compel the conclusion that California's DSL violates the Sixth Amendment?

DSL was unconstitutional.[10] First in the line of pertinent cases was *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that " 'any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' " *Id.* at 476 (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)). Next, *Blakely v. Washington*, 542 U.S. 296 (2004), clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*" and reaffirmed *Apprendi*'s "bright-line rule." *Id.* at 303 (emphasis in original). Finally, *United States v.* Booker, 543 U.S. 220 (2005), held that the Federal Sentencing Guidelines were invalid because, as in *Blakely*, " 'the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.' " *Id.* at 235 (quoting *Blakely*, 542 U.S. at 305). Taken together, *Apprendi*, *Blakely*, and *Booker*, firmly established that a sentencing scheme in which the maximum possible sentence is set based on facts found by a judge is not consistent with the Sixth Amendment.

That the California DSL squarely violated this principle — and that the result in *Cunningham* was compelled by precedent — is best illustrated by comparing the Washington sentencing statute at issue in *Blakely* with California's DSL. The Washington law in *Blakely* provided that "[a] judge may impose a sentence above the standard range if he finds 'substantial and compelling reasons justifying an exceptional sentence.' " 542 U.S. at 299.

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10. In determining whether a rule is "new" for *Teague* purposes, we may also consider our own case law. *See Leavitt v. Arave*, 383 F.3d 809, 819 (9th Cir. 2004) (per curiam) ("[C]ircuit court holdings suffice to create" an old rule under *Teague*. (internal quotation marks omitted)). In this case, however, a review of Supreme Court precedent is sufficient to demonstrate that the rule for which Butler argues is not new.

California's DSL similarly required imposition of the middle term unless the judge found factors in aggravation or mitigation. *See* Cal. Penal Code § 1170(b); Cal. R. Ct. 4.420(a). Like California's DSL, Washington law provided a non-exhaustive list of possible reasons for an exceptional sentence, and stated that "a reason offered to justify an exceptional sentence [could] be considered only if it t[ook] into account factors other than those which are used in computing the standard range sentence for the offense," i.e., factors other than those found by a jury beyond a reasonable doubt. *Blakely*, 542 U.S. at 299, 304 (internal quotation marks omitted); *cf.* Cal. R. Ct. 4.421, 4.423 (lists of factors in aggravation and mitigation); *id.* 4.408(a) (judge may consider additional criteria); *id.* 4.420(d) ("A fact that is an element of the crime upon which punishment is being imposed may not be used to impose the upper term.").

A judge's decision to impose an exceptional sentence under Washington law was reversible if "there [wa]s insufficient evidence in the record to support the reasons for imposing an exceptional sentence." *Blakely*, 542 U.S. at 299-300. A judge's sentencing decision under the DSL was also reviewable. *See, e.g.*, *People v. Osband*, 13 Cal. 4th 622, 728 (1996) (reviewing a sentence imposed under the DSL). Finally, like a judge applying the California DSL, the Washington sentencing judge was not required to impose an exceptional sentence if he found a single aggravating fact, but rather could make a judgment that a lower sentence was appropriate based on all the facts, as long as he provided sufficient reasons. *Blakely*, 542 U.S. at 305 n.8; *cf.* Cal. R. Ct. 4.420(b), (e).

Examining the Washington law at issue in *Blakely*, the Supreme Court recognized both that the judge had discretion to determine whether to impose an exceptional sentence and that there was not an exhaustive list of mitigating and aggravating factors. *Blakely*, 542 U.S. at 305 & n.8. These factors did not affect the Court's conclusion that the Washington sentencing scheme violated

the Sixth Amendment. *Id.* Instead, because the maximum possible penalty for the crime was set based on facts that had been found by a judge and not by a jury, the sentence was invalid. *Id. Cunningham* reiterated these same points, rejecting arguments already disapproved in *Blakely*. *See* 127 S. Ct. at 869 (noting that the Court had already held in *Blakely* that "broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system" from the brightline rule of *Apprendi*).

[3] In short, *Cunningham* did not add " 'any new elements or criteria for' " determining when a state statute violates the Sixth Amendment. *Boyd v. Newland*, 467 F.3d 1139, 1146 (9th Cir. 2006), *cert. denied* 127 S. Ct. 2249 (2007) (quoting *Murphy v. Dretke*, 416 F.3d 427, 439 (5th Cir. 2005)); *see also Beardslee*, 393 F.3d at 1040. It simply applied the rule of *Blakely* to a distinct but closely analogous state sentencing scheme. That the Supreme Court held for the first time that *California*'s sentencing scheme violates the Sixth Amendment does not render its decision in *Cunningham* a new rule.

The State advances a number of objections to this conclusion, but each fails for the same reason: the State cannot identify any relevant difference between the sentencing scheme in *Blakely* and that in *Cunningham*. The State points, first, to the fact that we have held that *Apprendi*, *Blakely*, and *Booker* announced "new rules." *See Jones v. Smith*, 231 F.3d 1227, 1236-37 (9th Cir. 2000) (*Apprendi*); *Schardt v. Payne*, 414 F.3d 1025, 1035-36 (9th Cir. 2005) (*Blakely*); *United States v. Cruz*, 423 F.3d 1119, 1120 (9th Cir. 2005) (per curiam) (*Booker*). But *Apprendi*, *Blakely*, and *Booker* were each sufficiently distinguishable from the cases that preceded them that courts might reasonably have disagreed as to the application of precedent. And, of course, the status of *Apprendi*, *Blakely*, and *Booker* as new rules has little bearing on whether they,

collectively, compelled the result in *Cunningham*.

Second, the State maintains that the existence of two dissents in *Cunningham* shows that not all reasonable jurists would have felt compelled to hold that California's sentencing scheme violates the Sixth Amendment. Dissents to the decision announcing a rule are relevant to the new rule analysis, but their existence does not alone "suffice[ ] to show that the rule is new." *Beard*, 542 U.S. at 416 n.5; *see Boyd*, 467 F.3d at 1145-46 (holding that *Johnson v. California*, 545 U.S. 162 (2005), a case that engendered a dissent in the Supreme Court, did not create a new rule). For one thing, dissents do not always rest on the assertion that the precedents do not support the legal rule applied by the majority. They are sometimes used to argue for a modification or overruling of existing precedent, or to express an ongoing disagreement with an entire line of cases. *See, e.g., Desist v. United States*, 394 U.S. 244, 258-59 (1969) (Harlan, J., dissenting) (arguing that *Stovall v. Denno*, 388 U.S. 293 (1967), which dictated the result in *Desist*, was wrongly decided and that new constitutional decisions must be applied to all cases on direct review); *Williams v. United States*, 401 U.S. 667, 677-81 (1971) (Harlan, J., concurring in part and dissenting in part) (continuing to argue that new rules must be applied to all cases on direct review); *Walton v. Arizona*, 497 U.S. 639, 674-75 (1990) (Brennan, J., dissenting), *overruled by Ring v. Arizona*, 536 U.S. 584 (2002) (adhering to his view "that the death penalty is in all circumstances a cruel and unusual punishment").

Also, dissents often disagree with the majority's application of established legal principles to discrete factual circumstances, and do not suggest that the majority has adopted a "new rule" of constitutional law. *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 377, 385-86 & n.3 (2005) (holding, despite a dissent, that the petitioner was entitled to habeas relief because counsel's failure to examine evidence that the government intended to present in

aggravation at sentencing phase violated the standard of *Strickland v. Washington*, 466 U.S. 668 (1984)). Neither variety of dissent indicates that there are reasonable alternative interpretations of the constitutional rule existing at the time they are written.

In contrast, when the Supreme Court has relied in part on dissents in earlier cases in applying *Teague*, the dissents in question have addressed considerations pertinent to the *Teague* analysis. *See Beard*, 542 U.S. at 414-16 (considering whether the decisions in *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990), which held that the Constitution prohibits states from requiring jurors to find mitigating factors unanimously, announced a new rule, and pointing to the dissents in *Mills* and *McKoy* as evidence that there was a significant difference between the issues addressed in *Mills* and *McKoy* and earlier cases).[11/]

The dissents in *Cunningham* were not of the variety relied on in *Beard*. Justice Kennedy's *Cunningham* dissent, joined by Justice Breyer, did not contend that *Cunningham* was wrongly decided, but instead maintained that "the *Apprendi* line of cases remains incorrect." *See Cunningham*, 127 S. Ct. at 872 (Kennedy, J., dissenting). The dissent then went on to suggest a modification of the

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11. In *Mills*, for example, the dissenters argued that previous case law controlled only the sentencing judge's consideration of mitigating factors, rather than the acts of individual jurors. 486 U.S. at 394 (Rehnquist, J., dissenting). In *McKoy*, the dissenters maintained that previous cases had controlled only what evidence may be considered, not how it must be considered. 494 U.S. at 465-66 (Scalia, J., dissenting). Although the dissenters were ultimately "wrong," in the sense that their positions were rejected by the majority of the court, they made arguments that the conclusions in *Mills* and *McKoy* were not required by precedent, and identified actual, if ultimately not legally significant, distinctions between these cases and prior precedent.

Apprendi rule for future cases which would have limited it to facts related to the nature of the crime, rather than the nature of the offender, but did not argue that its proposed modification was consistent with the Court's Sixth Amendment precedents. *See id.* at 872-73. Instead, Justice Kennedy's *Cunningham* dissent relied on the *dissents* in *Blakely*. *See id.* at 872 ("As dissenting opinions have suggested before, the Constitution ought not to be interpreted to strike down all aspects of sentencing systems that grant judicial discretion with some legislative direction and control." (citing *Blakely*, 542 U.S. at 314) (dissenting opinion of O'Connor, J.), and *id.* at 326-27 (dissenting opinion of Kennedy, J.))). Because the dissent did not present an argument that *Apprendi*, *Blakely*, and *Booker* can be interpreted to reach a result different from that reached in *Cunningham*, it does not shed light on the *Teague* inquiry.

Justice Alito's dissent is similarly unhelpful to the State, as that dissent also presented no argument that *Blakely* could be applied in *Cunningham* to reach a different result. Instead, Justice Alito, joined by Justices Kennedy and Breyer, contended, primarily, that the majority misapprehended California law, not that the DSL, *as the majority understood it*, passes constitutional muster under *Apprendi*, *Blakely*, and *Booker*. *Id.* at 876-79 (Alito, J., dissenting). Moreover, the dissent argued that the *practical* effect of the California DSL, as Justice Alito understood it, was indistinguishable from the federal sentencing system after *Booker*. The *Cunningham* majority pointed out, however, that the dissent's discussion depended on assumptions about aspects of the operation of the federal sentencing guidelines after *Booker* that had yet to be established.[12] *See id.* at 873. In this focus on the

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12. In fact, subsequent Supreme Court cases have disproved Justice Alito's assumptions about judicial review of district court sentencing decisions post-*Booker*. In particular, Justice Alito was mistaken in his view that judicial review would effectively prevent

practical effects of the California and federal sentencing schemes, Justice Alito's dissent echoed a position rejected by the majority in *Blakely*, *see* 542 U.S. at 320-22 (O'Connor, J., dissenting). Further, to the extent that Justice Alito's dissent suggested that the existence of appellate review of the ultimate sentence mitigates that principle, *see Cunningham*, 549 U.S. at 877-78, it was, in essence, an argument for overruling *Blakely*, which involved a sentencing scheme including judicial review, *see Blakely*, 542 U.S. at 299-300. For these reasons, Justice Alito's *Cunningham* dissent does not suggest that reasonable alternative interpretations of *Blakely* were available.

In the end, the State's position would require us to hold that each time a rule of general applicability, such as that announced in *Blakely*, is applied to a discrete circumstance, a new rule of constitutional law is created. Not only is that result inconsistent with the pertinent case law, it is not supported by the purposes of non-retroactivity on collateral review. In *Teague*, the Supreme Court adopted Justice Harlan's view that habeas " 'serves as a necessary additional incentive for trial and appellate courts . . . to conduct their proceedings in a manner

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district court judges from substantially departing from the guidelines in the absence of any case-specific facts. *See Kimbrough v. United States*, 128 S. Ct. 558, 575 (2007) (holding that "it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case"); *id.* at 570 (noting the government's position that, "as a general matter, courts may vary from Guidelines ranges based solely on policy considerations, including disagreements with the Guidelines" (internal quotation marks and alterations omitted)); *see also Rita v. United States*, 127 S. Ct. 2456, 2466 (2007) (explaining that even application of a presumption of reasonableness does not render the new Guideline regime unconstitutional because, unlike the regime in *Blakely*, it does not "*forbid*[ ] a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find").

consistent with established constitutional standards.'" 489 U.S. at 306 (quoting *Desist*, 394 U.S. at 262-63 (Harlan, J., dissenting)). Habeas courts can maintain this incentive without applying new constitutional standards to cases in which state courts had complied with "the constitutional standards that prevailed at the time the original proceedings took place." *Id.* To apply new rules to final state court convictions would threaten important principles of finality in criminal proceedings as well as of respect for state courts. *Id.* at 308-10.

[4] In this case, *Apprendi*, *Blakely*, and *Booker* made "courts throughout the land" aware that sentencing schemes that raise the maximum possible term based on facts not found by a jury violate the constitutional rights of defendants. *Id.* at 306. No principles of comity or federalism would be served by refusing to apply this rule to functionally indistinguishable state sentencing schemes on collateral review. *Cunningham* thus did not announce a new rule of constitutional law and may be applied retroactively on collateral review.

B. Exhaustion.

The State also argues that Butler's habeas petition must be dismissed for failure to exhaust, because *Cunningham* constitutes an intervening change in federal law that casts the legal issue in a fundamentally different light. *See Blair v. California*, 340 F.2d 741, 745 (9th Cir. 1965). Before *Teague*, we sometimes held a habeas petition unexhausted because of changes in federal law. *See, e.g.*, *id.* at 743-45 (holding that an issue was not exhausted where Supreme Court subsequently decided *Douglas v. California*, 372 U.S. 353, 357 (1963) (holding that indigent defendants are entitled to counsel in their first appeal as of right)); *Davis v. California*, 341 F.2d 982, 986 n.11 (9th Cir. 1965).

After *Teague*, an intervening change in federal law that casts the legal issue in a fundamentally different light is a "new rule" that cannot be applied on collateral review under any circumstances, regardless of whether the petitioner has exhausted his state court remedies. In other words, after *Teague*, the *Douglas* line of cases no longer serves any function. Where there is no new rule announced, the state court has had a fair chance to address the issue when it was raised, and there is no reason to require further exhaustion. We hold that when a petitioner raises a claim in state court that is later resolved in a case that announced no "new rule," a petitioner is not obligated to return to state court to exhaust his remedies under that case.

C. AEDPA.

Butler's petition was filed after April 24, 1996, so the provisions of the Antiterrorism and Effective Death Penalty Act apply to his petition. *See Fields v. Brown*, 503 F.3d 755, 763 (9th Cir. 2007) (en banc), *cert. denied* 76 U.S.L.W. 3555 (U.S. Apr. 14, 2008) (No. 07-8724). Under AEDPA, we cannot grant habeas relief to Butler unless the State court's decision in his case was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Supreme Court precedents that "qualify as an old rule under [*Teague*] . . . constitute 'clearly established Federal law' " within the meaning of AEDPA. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). We therefore proceed from the premise that the case law on a defendant's Sixth Amendment rights was clearly established when Butler's conviction became final and address only the other requirements of AEDPA.

"A state court decision is contrary to clearly established federal law if the state court either applies a rule that contradicts the governing law set forth by the

Supreme Court or arrives at a different result when confronted by a set of facts that are materially indistinguishable from a decision of the Supreme Court." *Sims v. Rowland*, 414 F.3d 1148, 1151 (9th Cir. 2005) (citing *Williams v. Taylor*, 529 U.S. at 405-06). An unreasonable application of federal law results when a state court "applies [Supreme Court] precedents to the facts in an objectively unreasonable manner," or unreasonably fails "to extend the holding or legal principles of a Supreme Court decision to a situation in which it should have controlled." *Id.* at 1152 (internal quotation marks omitted).

In reviewing a state court decision under § 2254(d)(1), we "look to the last reasoned decision of the state court as the basis of the state court's judgment." *Polk v. Sandoval*, 503 F.3d 903, 909 (9th Cir. 2007). The California Court of Appeal issued the last reasoned state court decision when it rejected Butler's direct appeal. In denying Butler's challenge to his sentence, the California Court of Appeal relied entirely on the reasoning of the California Supreme Court in *Black I*. We therefore look to the reasoning of *Black I* to determine whether the AEDPA requirements have been met.

[5] *Black I* reached its result — upholding the DSL — by applying a rule of decision contrary to clearly established Supreme Court precedent. The California Supreme Court articulated the relevant question as

> whether a trial judge's decision to impose an upper term sentence under the California determinate sentencing law involves the type of judicial factfinding that traditionally has been performed by a judge in the context of exercising sentencing discretion or whether it instead involves the type of factfinding that traditionally has been exercised by juries in the context of determining whether the elements of an offense have been proved.

Black I, 35 Cal. 4th at 1253-54. Applying that rule, the court concluded that the upper term is the relevant statutory maximum, because California's DSL "simply authorize[s] a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence." *Id.* at 1254. The California Supreme Court so ruled even though a sentencing court "cannot impose the upper term unless there is at least one aggravating factor." *Id.*

The rule applied in *Black I* is nowhere to be found in Supreme Court precedent. Instead, it parallels the position of the *dissenters* in several of the Supreme Court's sentencing cases. *See Booker*, 543 U.S. at 235-36 (rejecting the dissent's reliance on the traditional authority of judges to engage in factfinding as to matters relevant to sentencing); *Apprendi*, 530 U.S. at 535 (O'Connor, J., dissenting) (arguing that it is acceptable to allow judges to engage in factfinding as to matters that have traditionally been treated as affecting punishment rather than as elements); *accord Black I*, 35 Cal. 4th at 1270 (Kennard, J., concurring and dissenting) ("Nothing in the high court's majority opinions in *Apprendi*, *Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding that traditionally has been performed by a judge." (internal quotation marks omitted)).

[6] In fact, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely*, 542 U.S. at 303. Rather than applying this bright-line rule, *Black I* applied a "traditional judicial factfinding" rule inconsistent with Supreme Court precedent. Its decision was therefore "contrary to" the clearly established law of the Supreme Court, and the requirements of AEDPA are met. *See Price v. Vincent*, 538 U.S. 634, 640 (2003) (noting that a decision

is contrary to clearly established law if it "applies a rule" that contradicts Supreme Court precedent).

D. Constitutional Violation.

Our conclusion that the decision of the California Court of Appeal was "contrary" to clearly established Supreme Court precedent is not the end of our inquiry. Our power to grant the writ of habeas corpus to a state inmate depends on his actually being "in custody in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2241(c)(3). Having held that the requirements of AEDPA have been met, we must also determine, applying a de novo review standard, whether there has been a constitutional violation. *See Frantz v. Hazey*, 513 F.3d 1002, 1013 (9th Cir. 2008) (en banc) (holding that, "[w]hen 'the requirement set forth in § 2254(d)(1) is satisfied, a federal court must then resolve the constitutional claim without the deference AEDPA otherwise requires' " (quoting *Panetti v. Quarterman*, 127 S. Ct. 2842, 2858 (2007)). We therefore proceed to a de novo analysis of whether, under a correct understanding of Supreme Court precedent, Butler's sentence violates the Sixth Amendment. The State contends that Butler's sentence does not violate the Constitution because, under California law, the existence of a single aggravating factor is sufficient to authorize an upper term sentence, and the "probation" aggravating factor comes within the exception for "prior convictions" created by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

Almendarez-Torres held that the fact of a prior conviction need not be pleaded in an indictment or proved to a jury beyond a reasonable doubt. *Id.* at 244, 247. We agree that, under California law, only one aggravating factor is necessary to authorize an upper term sentence. So the probation factor alone would suffice to render the sentence constitutional were it found applicable in a manner consistent with the Sixth Amendment. We

conclude, however, that whether the defendant was on probation at the time of commitment of a crime does not come within the narrow *Almendarez-Torres* exception to the fact-finding requirements established in the *Apprendi* line of cases and so cannot suffice to make Butler's sentence constitutional.

1. California law.

The California Supreme Court revisited its decision in *Black I* after a remand from the United States Supreme Court for reconsideration in light of *Cunningham*. *See People v. Black*, 41 Cal. 4th 799, 805 (2007) ("*Black II*"). *Black II* once again upheld Black's sentence, on the ground that, "under the DSL[,] the presence of one aggravating circumstance renders it lawful for the trial court to impose an upper term sentence." *Id.* at 815. *Black II* observed that, under Supreme Court precedent, "as long as a single aggravating circumstance . . . has been established in accordance with the requirements of *Apprendi* and its progeny, any additional fact finding engaged in by the trial court in selecting the appropriate sentence . . . does not violate the defendant's right to jury trial." *Id.* at 812. One of the aggravating factors in Black's case was the existence of a prior conviction. The California Supreme Court concluded, applying *Almendarez-Torres*, that that factor had been established in a manner consistent with the Constitution; so Black's sentence was not unconstitutional. *Id.* at 816.

Butler argues that we should not accept the *Black II* court's interpretation of the California DSL as requiring only a single aggravating factor to authorize the upper term. As an initial matter, Butler waived this argument by failing to raise it either in the district court or in his brief on appeal, mentioning it for the first time at oral argument. *See Nw. Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 923 (9th Cir. 1988).

Even were the issue not waived, however, Butler's argument would fail. We are bound to accept a state court's interpretation of state law, except in the highly unusual case in which the "interpretation is clearly untenable and amounts to a subterfuge to avoid federal review" of a constitutional violation. *Knapp v. Cardwell*, 667 F.2d 1253, 1260 (9th Cir. 1982); *see Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11 (1975). The California Supreme Court's interpretation of the DSL is not so inconsistent with prior case law or the statute itself as to suggest that it is merely a subterfuge. Before *Black II*, the California courts had frequently held that only a single aggravating factor is required to support an upper term sentence. *See, e.g., People v. Osband*, 13 Cal. 4th 622, 728 (1996); *People v. Forster*, 35 Cal. Rptr. 2d 705, 713 (Ct. App. 1994) ("[A] single valid factor in aggravation is sufficient to justify the imposition of the upper term."); *People v. Piceno*, 241 Cal. Rptr. 391, 395 (Ct. App. 1987) (same). Although the state courts before *Cunningham* were addressing a somewhat different question — whether the trial court had abused its discretion in selecting the upper term sentence from among those available — it is consistent with these earlier cases to hold that only one aggravating factor was necessary to set the upper term as the statutory maximum. Indeed, it would be strange if more aggravating factors were required to *set* the upper term as the statutory maximum than are required to justify *selection* of the upper term once the maximum has been raised.

Further, although the California Rules of Court state that "*[s]election* of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation," Cal. R. Ct. 4.420(b) (emphasis added), the statute itself provides that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime," Cal. Penal Code § 1170(b). The weighing language of the Rules of Court can reasonably be interpreted as guiding a judge's discretion to *select* a term

within the statutory maximum set by section 1170(b) after an aggravating factor has been found. In short, California's interpretation of the DSL is not "clearly untenable."

[7] Having established that, under California law, only one aggravating factor is necessary to set the upper term as the maximum sentence, we turn to analyzing whether Butler's sentence was imposed in violation of the Constitution. The Sixth Amendment does not prevent judges from "exercis[ing] discretion — taking into consideration various factors relating both to offense and offender — in imposing a judgment *within the range* prescribed by statute." *Apprendi*, 530 U.S. at 481. In imposing a sentence, judges may "implicitly rule on those facts [they] deem[ ] important to the exercise of [their] sentencing discretion." *Blakely*, 542 U.S. at 309. For that reason, if at least one of the aggravating factors on which the judge relied in sentencing Butler was established in a manner consistent with the Sixth Amendment, Butler's sentence does not violate the Constitution. Any additional factfinding was relevant only to selection of a sentence within the statutory range.

2. Probation and the "Prior Conviction" Exception.

The trial court imposed an upper term sentence on Butler based on two aggravating factors: his victim was particularly vulnerable, and he was on probation at the time he committed the assault. The State argues that Butler's sentence does not violate the Constitution because the fact that Butler was on probation at the time of the crime was found in a manner consistent with the Constitution. We cannot agree with the State's premise — that the narrow exception for prior convictions extends to a defendant's probationary *status* at the time of the instant crime.

In *Almendarez-Torres*, the Supreme Court determined that the fact of a prior conviction for an aggravated felony need not be pleaded in an indictment or proved to a jury beyond a reasonable doubt. 523 U.S. at 247. Subsequent sentencing cases, however, have substantially undermined the basis for this conclusion. Distinguishing *Almendarez-Torres*, *Apprendi* characterized the "prior conviction" exception as at best "an exceptional departure from" historic sentencing practice, 530 U.S. at 487, and observed that it is "arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested," *id.* at 489-90. *See also id.* at 518-19 (Thomas, J., concurring) (concluding that *Almendarez-Torres* was wrongly decided); *Shepard v. United States*, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring in part and in the judgment) (observing that "a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided" and suggesting that, "in an appropriate case, this Court should consider *Almendarez-Torres*' continuing viability").

[8] Nonetheless, the Supreme Court has not overruled the *Almendarez-Torres* exception for prior convictions, continuing to hold that "*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490 (emphasis added); *see also Booker*, 543 U.S. at 244; *Blakely*, 542 U.S. at 301. Concommittantly, we have repeatedly recognized our obligation to apply the *Almendarez-Torres* exception, unless and until it is rejected by the Supreme Court. *See, e.g.*, *United States v. Lopez*, 500 F.3d 840, 848 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 950 (2008); *United States v. Diaz-Argueta*, 447 F.3d 1167, 1170 (9th Cir. 2006); *United States v. Weiland*, 420 F.3d 1062, 1079 n.16 (9th Cir. 2005).

We are left, then, with the task of determining the outer bounds of the "prior conviction" exception after *Apprendi*. We find some guidance in *Shepard*, which addressed the kind of evidence on which a court may rely in determining whether a prior conviction constitutes a crime of violence for purposes of the Armed Career Criminal Act of 1984 ("ACCA"). 544 U.S. at 15-16. *Shepard* noted *Almendarez-Torres*' exception for prior convictions, but also recognized that a district court's findings of fact about the basis for a prior guilty plea or conviction at some point "raise[ ] the concern underlying . . . *Apprendi*," that is that the Constitution "guarantee[s] a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence." *Id.* at 25.

Without delineating precisely the line between those facts that come within the *Almendarez-Torres* exception and those that do not, *Shepard* "avoid[ed] serious risks of unconstitutionality" by "limit[ing] the scope of judicial factfinding" under the ACCA to whether a prior guilty plea or jury verdict necessarily constitutes a conviction for the "generic" crime at issue. *Id.* at 25-26. Specifically, where the conviction is by guilty plea, a judge may consider only "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Id.* at 16; *see also Taylor v. United States*, 495 U.S. 575, 602, 610 (1990) (indicating the documents which may permissibly be considered in a case where conviction is by jury verdict). *Shepard* thus strongly suggests that the *Almendarez-Torres* exception does not extend to any and all facts related to a prior conviction. Rather, to avoid a potential conflict with the Sixth Amendment, *Shepard* limited the consideration of prior convictions at judicial sentencing to those facts that can be established by the "prior judicial record" of conviction.

Heeding the Supreme Court's cautions about *Almendarez-Torres* and *Shepard*'s guidance, we have been

hesitant to broaden the scope of the prior conviction exception to facts not apparent on the face of conviction documents. *United States v. Kortgaard*, 425 F.3d 602, 610 (9th Cir. 2005) (concluding that we must treat *Almendarez-Torres* as a "narrow exception to the general rule"). Under our precedents, the exception does not extend to qualitative evaluations of the nature or seriousness of past crimes, because such determinations cannot be made solely by looking to the documents of conviction. *See id.* at 607 (holding that "seriousness" of past crimes and "likelihood of recidivism" are not facts that come within the "prior conviction" exception); *Stokes v. Schriro*, 465 F.3d 397, 404 (9th Cir. 2006) (holding that the determination whether the present offense is "strikingly similar" to a past offense does not come within the "prior conviction" exception).

Nor does the *Almendarez-Torres* exception apply to past convictions as a juvenile or to prior removal proceedings, because those underlying proceedings lack full Sixth Amendment protections. *See United States v. Tighe*, 266 F.3d 1187, 1193-95 (9th Cir. 2001) ("[T]he 'prior conviction' exception to *Apprendi*'s general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt." (citing *Apprendi*, 530 U.S. at 496)); *United States v. Covian-Sandoval*, 462 F.3d 1090, 1097-98 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1866 (2007) (holding that prior removal proceedings are not within the exception because they "are civil, not criminal, lacking both juries and the reasonable doubt standard").

Our case law on criminal penalties for illegal reentry is especially instructive. In *United States v. Salazar-Lopez*, 506 F.3d 748 (9th Cir. 2007), *cert. denied* 2008 WL 1881475 (U.S. May 27, 2008) (No. 07-10561), we addressed a conviction under 8 U.S.C. § 1326(b)(1), which raises the maximum term for illegal reentry from two to ten years if the relevant prior "removal [i]s subsequent to a conviction for commission of . . . a felony." The jury had found that

Salazar-Lopez was removed from the United States at some point, but was not required to find the date of that removal. *Salazar-Lopez*, 506 F.3d at 751. We held that a district judge could determine whether there was a prior felony conviction without committing *Apprendi* error, but that the *timing* of the subsequent removal must be pleaded in an indictment and proved to a jury beyond a reasonable doubt. *Id.* at 751-52. This was so, even though the statutory maximum was based in part on the fact and timing of a prior conviction reflected in conviction documents, and even though the date of the later removal was reflected in documents from an immigration court. In other words, where the basis for the higher statutory maximum depends on facts that occurred after the prior conviction and is not evident on the face of conviction documents, application of the higher statutory maximum violates *Apprendi*. *Id.* at 752.

In sum, our case law establishes three prerequisites for applying the *Almendarez-Torres* exception. First, "[t]he fact of a prior conviction is the *only* fact that both increases a penalty beyond the statutory maximum and can be found by a sentencing court." *Covian-Sandoval*, 462 F.3d at 1097. Second, the narrow prior conviction exception applies only to facts directly reflected in the documents of conviction, not to secondary "facts that are derived or inferred" from a prior conviction or from the conviction documents. *Kortgaard*, 425 F.3d at 610. Third, as the prior conviction exception is justified by the reliability of court documents created as part of a process with Sixth Amendment safeguards, it does not extend to facts that may be proven only by reference to documents that were not developed as a result of such a process. *See Covian-Sandoval*, 462 F.3d at 1097-98; *Tighe*, 266 F.3d at 1195.

[9] Applying these established principles to the determination of a defendant's current probation status, we conclude that such status does not come within the narrow

prior conviction exception. That the defendant was initially sentenced to probation should be ascertainable from the conviction documents and, we may assume, would be a fact coming within the prior conviction exception.[13] The fact that a defendant was on probation at the moment of the current crime, however, is not reflected in the documents of a prior conviction nor, for that matter, may it be conclusively inferred from those documents.

Under California probation law, for example, a judge retains the authority to modify the terms of an individual's

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13. Indeed, we have permitted judges to make factual findings regarding the sentence initially imposed for a prior conviction, which is apparent on the face of conviction documents. For example, under *Almendarez-Torres*, a finding by a judge of a prior conviction for an aggravated felony can be the basis for raising the maximum term in an illegal reentry case under 8 U.S.C. § 1326(b), *see United States v. Calderon-Segura*, 512 F.3d 1104, 1111 (9th Cir. 2008), and aggravated felonies are often defined in terms of the length of the sentence imposed, *see, e.g.*, 8 U.S.C. § 1101(a)(43)(F) ("a crime of violence . . . for which the term of imprisonment [is] at least one year"); *id.* § 1101(a)(48)(B) ("Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.").

In contrast, we have never held that the amount of time ultimately served, or the defendant's status as a prisoner at the time of the crime — facts analogous to the probation factor in this case — come within the exception. Although some of our cases have stated generally that "criminal history" determinations under U.S.S.G. § 4A1.1 come within the prior conviction exception, we have never so held in a case involving subsections (d) and (e) of that Guideline, which assign points for committing a crime while on probation or while incarcerated and for committing a crime within two years of release from prison, respectively. *See, e.g.*, *United States v. Hernandez-Castro*, 473 F.3d 1004, 1007 (9th Cir. 2007); *United States v. Martin*, 278 F.3d 988, 1006 (9th Cir. 2002).

probation at any time, including terminating probation early or extending it for a longer term. California Penal Code § 1203.3(a) provides:

> The court shall have authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence. The court may at any time when the ends of justice will be subserved thereby and when the good conduct and reform of the person so held on probation shall warrant it, terminate the period of probation, and discharge the person so held.

A probation term can therefore be terminated early, or be extended, or be revoked as a result of a probation violation. *See, e.g., People v. Butler*, 105 Cal. App. 3d 585, 587 (Cal. Ct. App. 1980) (describing early release from probation after determination that probationer was totally disabled); *People v. Cookson*, 54 Cal. 3d 1091, 1097 (1991) (extending probation for nonwillful failure to pay restitution). Such changes would not appear in the original conviction documents, as they would occur later.

As a result, the fact that an individual was sentenced to a term of probation at the time of a prior conviction — a fact that may be reflected in conviction documents of the kind approved by *Shepard* — is not sufficient to prove that he was on probation at the time of the current crime. That determination — like the timing of a prior removal in *Salazar-Lopez* — can only be made by drawing inferences from the prior conviction documents and by considering facts and circumstances that occurred after the prior conviction.

[10] The fact of having been terminated from probation, placed on extended probation, or having probation revoked is, of course, likely to be recorded in court documents. But like a removal proceeding or juvenile

adjudication, probation revocation hearings are not conducted with the safeguards that attend a criminal conviction. *See, e.g., People v. Shepherd*, 60 Cal. Rptr. 3d 616, 619 (Ct. App. 2007) (for revocation of probation, a violation must be proved only by a preponderance of the evidence). Due process does not require that they be so conducted. *See Gagnon v. Scarpelli*, 411 U.S. 778, 787-90 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). Requests to modify, extend, or terminate probation may be attended by even fewer procedural formalities than probation revocation hearings, which can lead to incarceration. *See, e.g., Cookson*, 54 Cal. 3d at 1096-97 (probation may be extended in circumstances under which it would not be constitutional to revoke probation). We are therefore convinced that the fact of being on probation at the time of a crime does not come within the "prior conviction" exception and must be pleaded in an indictment and proved to a jury beyond a reasonable doubt.[14]

We are aware that decisions of several of our sister circuits suggest that whether a defendant was on probation at the time of the crime is a fact that comes within the prior conviction exception and so may be found by a judge by a preponderance of the evidence. *See, e.g., United States v. Corchado*, 427 F.3d 815, 820 (10th Cir. 2005); *United States v. Williams*, 410 F.3d 397, 399, 402 (7th Cir. 2005); *United States v. Fagans*, 406 F.3d 138, 141-42 (2d Cir. 2005). We

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14. Our conclusion that probation status at the time of the instant crime does not come within the "prior conviction" exception does not suggest that petitioners will always, or even often, obtain relief when a judge, rather than a jury, has made such a finding. As we discuss further below, *Apprendi* errors are harmless when we can ascertain that a judge was presented with sufficient documents at sentencing — including the original conviction documents and any documents evidencing modification, termination, or revocation of probation — to enable a reviewing or sentencing court to conclude that a jury would have found the relevant fact beyond a reasonable doubt. *See Salazar-Lopez*, 506 F.3d at 755.

do not find these cases helpful in analyzing the issue before us.

As far as we can ascertain from the opinions, our sister circuits were not asked to consider whether the fact of being on probation is distinct from other facts associated with a prior conviction. Rather, they were faced only with general *Apprendi* challenges to multiple findings about an individual's criminal history. *See Corchado*, 427 F.3d at 820 (holding that the prior conviction exception extends generally to "subsidiary findings" about a prior conviction); *Williams*, 410 F.3d at 402 (holding that the district court did not err in making "findings as to the fact of his prior convictions or as to the nature of those convictions"); *Fagans*, 406 F.3d at 141-42 (holding generally that facts about "the conviction itself and the type and length of a sentence imposed" come within *Almendarez-Torres*). Insofar as these cases held only that the question whether the defendant was *originally sentenced* to probation at the time of conviction comes within the *Almendarez-Torres* exception, we do not disagree, for the reasons we have explained. Insofar as these cases from other circuits suggest that the defendant's status as a probationer at the time of the instant crime is within the exception, that result cannot be squared with this circuit's case law, for the reasons we have explained.[15] And as the cases do not clearly distinguish the two issues, they contain no

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15. Some of our sister circuits have also taken a broader view of the *Almendarez-Torres* exception, permitting judicial factfinding as to facts that we have held do not come within the *Almendarez-Torres* exception. *See, e.g.*, *Williams*, 410 F.3d at 399, 402 (including fact of juvenile adjudications in the prior conviction exception). Moreover, the circuits that have concluded that probation status is within the prior conviction exception have not explicitly held, as we have, that juvenile adjudications do not come within the exception, or that "facts that are derived or inferred" from conviction documents must be found by a jury. *See Kortgaard*, 425 F.3d at 610; *cf. Corchado*, 427 F.3d at 820 (judge can make "subsidiary findings" based on conviction documents).

reasoning about why post-conviction probation status comes within the prior conviction exception.

[11] We therefore conclude that the Sixth Amendment was violated when Butler's maximum possible term was raised based on facts, other than a prior conviction, that were not admitted or proved to a jury beyond a reasonable doubt.

E. Harmlessness.

Butler is entitled to relief only if the sentencing error in his case is not harmless. *See Washington v. Recuenco*, 126 S. Ct. 2546, 2552 (2006) (holding that sentencing errors are subject to harmless error analysis). Applying *Brecht v. Abrahamson*, 507 U.S. 619 (1993), we must determine whether "the error had a substantial and injurious effect on [Butler's] sentence." *Hoffman v. Arave*, 236 F.3d 523, 540 (9th Cir. 2001) (internal quotation marks omitted). Under that standard, we must grant relief if we are in "grave doubt" as to whether a jury would have found the relevant aggravating factors beyond a reasonable doubt. *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). Grave doubt exists when, "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *Id.* at 435.

Further, in conducting harmless error review of an *Apprendi* violation, we may consider evidence presented at sentencing proceedings. But "we do not consider new admissions made at sentencing in our harmless error inquiry," *Salazar-Lopez*, 506 F.3d at 755 (citing *United States v. Jordan*, 291 F.3d 1091, 1097 (9th Cir. 2002)); *see also United States v. Nordby*, 225 F.3d 1053, 1061 n.6 (9th Cir. 2000), *overruled on other grounds by United States v. Buckland*, 289 F.3d 558, 568 (9th Cir. 2002) (en banc).[16]

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16. The parties have brought to our attention *United States v. Zepeda-Martinez*, 470 F.3d 909 (9th Cir. 2006), in which it appears

Under California law, as we have explained, only one aggravating factor is necessary to set the upper term as the maximum term. Any *Apprendi* error therefore will be harmless if it is not prejudicial as to just one of the aggravating factors at issue.

Here, the district court noted that it is impossible to know what the trial court *would* have done had it found only one aggravating factor. It concluded that the Sixth Amendment violation therefore could not be harmless unless it did not affect either of the aggravating factors upon which the judge relied. With regard to a Sixth Amendment sentencing violation, however, the relevant question is not what the trial court *would* have done, but what it legally *could* have done. After one aggravating factor was validly found, the trial court legally *could* have imposed the upper term sentence. That the judge might not have done so in the absence of an additional factor does not implicate the Sixth Amendment, as that consideration concerns only the imposition of a sentence within an authorized statutory range.

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that this court did consider a concession made at sentencing in holding that an *Apprendi*-error was harmless. *Id.* at 913 (making reference to the defendant's failure to contest the date of his removal at sentencing). *Salazar-Lopez*, however, was decided after *Zepeda-Martinez* and reiterates our long-standing rule that admissions at sentencing are not relevant to an *Apprendi* harmless error analysis. *Salazar-Lopez*, 506 F.3d at 755. Moreover, in *Zepeda-Martinez*, there was "overwhelming" evidence demonstrating the date of Zepeda's removal, without regard to any admission by the defendant. 470 F.3d at 913 (the government introduced a warrant of removal indicating the date of Zepeda's removal and Zepeda himself submitted the first page of the same document in a pre-trial filing). At best, then, *Zepeda-Martinez* stands for the proposition that a defendant's failure at sentencing to dispute a particular fact may be considered in a harmless error analysis when there is overwhelming additional evidence of the relevant fact.

With these principles in mind, we turn to the aggravating factors that form the basis for Butler's sentence.

1. Vulnerable Victim.

[12] The state trial court found that Daria Butler was a particularly vulnerable victim because "she was attacked from behind." Under California law, vulnerable means " 'defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the defendant's criminal act.' " *People v. Weaver*, 58 Cal. Rptr. 3d 18, 27 (Ct. App. 2007) (quoting *People v. Smith*, 156 Cal. Rptr. 502, 503 (Ct. App. 1979)). A victim is "particularly" vulnerable only if he is vulnerable to a "special or unusual degree, to an extent greater than in other cases." *People v. Loudermilk*, 241 Cal. Rptr. 208, 214 (Ct. App. 1987). A victim is thus not "particularly" vulnerable where all victims of the crime of conviction are vulnerable in the same manner. *See People v. Bloom*, 190 Cal. Rptr. 857, 865 (Ct. App. 1983) (stating that "[a]ll victims of drunk drivers are 'vulnerable victims' ").

There is little doubt, based on the evidence presented at trial, that the jury would have concluded beyond a reasonable doubt that Daria Butler was attacked from behind. Butler never contested the evidence showing that Daria's wounds were to the back of her head, and the jury's verdict demonstrates that it believed Daria's version of the incident. But after examining California case law on the "particularly vulnerable" victim aggravating factor, we have grave doubt about whether a jury would have found that Daria was a particularly vulnerable victim of the crime of domestic assault (Cal. Penal Code § 273.5) because she was attacked from behind.

In the overwhelming majority of cases, "particularly vulnerable victims" have had inherent personal characteristics that, sometimes in combination with the

manner in which the crime was committed, render them more vulnerable than other victims. *See, e.g., People v. Bishop*, 204 Cal. Rptr. 502, 505 (Ct. App. 1984) (victims were very young and of small stature); *People v. McGlothin*, 79 Cal. Rptr. 2d 83, 87 (Ct. App. 1998) (the victims were particularly vulnerable because they were elderly and were attacked in a parking lot late at night); *People v. Karsai*, 182 Cal. Rptr. 406, 416 (Ct. App. 1982) (victim was young and physically weak); *id.* ("While age and physical traits are not the only factors which may indicate particular vulnerability, they are the most obvious.").

The California courts have in a few cases relied on aspects of the status of the victim that are more changeable than age or physical frailty, but have done so only when the victim was seriously, if only temporarily, incapacitated. *People v. Hoover*, 92 Cal. Rptr. 2d 208, 215-16 (Ct. App. 2000) (extremely intoxicated victim in domestic violence case); *People v. White*, 172 Cal. Rptr. 612, 618 (Ct. App. 1981) (shooting a victim already incapacitated from earlier gunshot), *abrogated on other grounds by People v. Scott*, 9 Cal. 4th 331, 353 n.16 (1994); *Loudermilk*, 241 Cal. Rptr. at 214 (sleeping victim); *Smith*, 156 Cal. Rptr. at 503 (sleeping victims). We found no case in which attacking a victim from behind was the sole basis for a finding of particular vulnerability.

Here, there is no evidence that at the time of the crime Daria was less able than other victims to ward off attacks because of any such disability or incapacitation. Indeed, there was evidence from which a jury could conclude that Daria was generally a physically capable individual, as there was testimony at trial from both Daria and Butler that she had physically attacked Butler in the past.[17] A

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17. We note that, in pointing to the fact that Daria had engaged in physical fights with Butler in the past, we do not mean to suggest that Daria was not clearly a victim of Butler's crime, or that

jury might have concluded that having one's back turned is similar to being asleep in the sense that both are temporary states, and that in each case the defendant takes advantage of a moment of greater assailability. But they are not so similar that we can say with confidence, particularly in light of the many cases focused on characteristics such as age and physical frailty, that a jury would conclude that an individual with her back turned is a "particularly vulnerable victim."

[13] Moreover, as we have already discussed, a victim must be not only vulnerable, but "particularly" vulnerable in relation to other victims of the same crime. *See, e.g., People v. Piceno*, 241 Cal. Rptr. 391, 394 (Ct. App. 1988) (holding that it was error to apply the particularly vulnerable victim factor to a conviction for vehicular manslaughter because, while "[n]o one could possibly deny the victim here was vulnerable[,] . . . all victims of vehicular manslaughter . . . were vulnerable"); *People v. Flores*, 171 Cal. Rptr. 777, 778-79 (Ct. App. 1981) (applying particularly vulnerable victim aggravator because of the victim's young age was inappropriate because all victims of the crime of oral copulation with an individual under 16 are young).[18]

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she is in any way at fault for not having defended herself successfully in this instance. We mean only to demonstrate that she did not have any inherent physical characteristics that would render her less capable of defending herself than most victims of assault.

18. The State argues that a recent California Court of Appeal case has limited the rule that a victim is only particularly vulnerable when other victims of the offense are not vulnerable in the same manner. *See People v. Weaver*, 58 Cal. Rptr. 3d 18, 29 (Ct. App. 2007) (holding that victims of drunk driver were particularly vulnerable because driver was traveling in the wrong direction at night with her lights off). *Weaver*, however, purported to apply the rule that a victim must be particularly vulnerable, holding that most victims of vehicular manslaughter are not as vulnerable as the victims were in that case. *See id.* Moreover, *Weaver*, like all of the cases we have cited, is a California Court of Appeal case, and cannot overrule the many cases

The particularly vulnerable victim aggravating factor was applied to Butler's conviction for domestic violence under Cal. Penal Code section 273.5. In interpreting section 273.5, the California Court of Appeal has noted that it was the purpose of the legislature in criminalizing domestic violence to protect individuals who are in a vulnerable position. *See People v. Mora*, 59 Cal. Rptr. 801, 804-05 (Ct. App. 1996). In other words, it is in the nature of domestic violence that its victims are vulnerable, because of their close relationship with their attacker, their attacker's typically greater physical strength, and their isolation in their homes. As a result, a jury could have concluded that Butler was not *more* vulnerable than other victims of domestic violence because she was attacked from behind.[19]

[14] In sum, we are left with "grave doubt" as to whether a jury would have found, beyond a reasonable doubt and based solely on the circumstance of being attacked from behind, that Daria was a "particularly vulnerable" victim of domestic violence. The *Apprendi* error was therefore not harmless with regard to the first aggravating factor. *See O'Neal*, 513 U.S. at 445 ("[W]e conclude that, when a habeas court is in grave doubt as to the harmlessness of an error that affects substantial rights, it should grant relief.").

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that have reached a different result on this issue. *See, e.g., Piceno*, 241 Cal. Rptr. at 394; *People v. McNiece*, 226 Cal. Rptr. 733, 739 (Ct. App. 1986), *overruled on other grounds by People v. Flood*, 18 Cal. 4th 470 (1988)); *Bloom*, 190 Cal. Rptr. at 865.

19. In concluding that allowing a judge to find the "particularly vulnerable victim" factor was not harmless, we do not hold that the trial court was wrong as a matter of California law when it found that Daria was a particularly vulnerable victim because she was struck from behind. We hold only that a jury properly instructed on California law and applying a reasonable doubt standard could well have found otherwise.

2. Probationary Status.

[15] Whether a jury would have found Butler's probationary status beyond a reasonable doubt turns out to be, on the record in this case, a difficult question to answer. The record before the district court does not reveal what evidence on the probation issue was presented to the state trial court. We therefore remand to the district court for an evidentiary hearing on that question.

The state trial court opened the sentencing proceeding by stating, "I've read and considered the probation report in this case." After statements from the prosecutor and defense counsel, the judge found that Daria Butler was a particularly vulnerable victim and that Butler "was on probation at the time the crime was committed." In response to the judge's second finding, Butler's lawyer suggested that the probation aggravating factor be stricken because "there is no indication that he was noncompliant except for this."

The statement of defense counsel at sentencing suggests that Butler acknowledged, or at least did not dispute, that he was on probation at the time of the crime. Even assuming, however, that defense counsel's statement was sufficiently specific as to constitute an admission, we may not consider it in determining whether the *Apprendi* error in Butler's sentencing was harmless. *See Salazar-Lopez*, 506 F.3d at 755.

We are left, then, to determine whether the evidence presented by the prosecution at sentencing is sufficient to render the error harmless. Unfortunately, the record simply does not reveal what that evidence was. Having reviewed all the submissions to the district court in this case, we have not found a probation report or any other document that reflects Butler's probationary status at the time of the crime. At oral argument, the government acknowledged that it did not submit the probation report

read by the sentencing judge to the district court. We thus cannot be certain what evidence was presented to the state trial court on the question of Butler's probationary status. Yet, to determine whether an *Apprendi* error was harmless we must examine the whole record, including the evidence presented by the government at sentencing. We therefore cannot make our determination without further factfinding as to what evidence was presented at sentencing.

[16] We recognize that neither of the parties has requested an evidentiary hearing on this issue. Further factfinding on this issue is necessary, however, not to assist either of the parties in meeting a burden of proof as to harmlessness, but to assist the court in making an accurate determination. *See Frantz*, 513 F.3d at 1023 (remanding to district court for evidentiary hearing to determine circumstances in which in chambers conference in absence of the petitioner was conducted); *see also Mancuso v. Olivarez*, 292 F.3d 939, 949 n.4 (9th Cir. 2002) ("[W]hether a trial error had a substantial and injurious effect is not to be analyzed in terms of burdens of proof."). We therefore vacate the grant of a writ of habeas corpus to Butler and remand for an evidentiary hearing on what evidence was presented to the state trial court in support of the allegation that Butler was on probation at the time of his crime.

CONCLUSION

For the foregoing reasons, the judgment of the district court is **AFFIRMED** in part, **VACATED** in part, and **REMANDED** for proceedings not inconsistent with this opinion.[20]

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20. Butler also contends that he must be resentenced under California law as it existed at the time of his initial sentencing. Following the decision in *Cunningham*, the California legislature amended its statutes such that imposition of the lower, middle, or

Each party shall bear its own costs on appeal.

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upper term is now discretionary and does not depend on the finding of any aggravating factors. *See* Cal. Penal Code § 1170(b) (2007). In *People v. Sandoval*, 41 Cal. 4th 825 (2007), the California Supreme Court addressed the appropriate procedure for resentencing individuals who had been sentenced under the prior version of the law, and concluded that it need not decide whether the 2007 amendments to the penal code were retroactive, because it could simply judicially "reform" the previous law to require sentencing in accordance with the principles of the 2007 amendments. *Id.* at 849.

Butler argues that applying this judicial reformation of the law violates the ex post facto principles contained in the Due Process Clause of the Fourteenth Amendment. *See Bouie v. City of Columbia*, 378 U.S. 347, 352-55 (1964). As Butler acknowledges, however, this question is controlled by *United States v. Dupas*, 419 F.3d 916 (9th Cir. 2005), in which we held that retroactive application of the remedial opinion in *Booker* does not violate the Due Process Clause. *Id.* at 921.

APPENDIX C

FILED - SOUTHERN DIVISION
CLERK, U.S. DISTRICT COURT
JUL 27 2007
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

ENTERED - SOUTHERN DIVISION
CLERK, U.S. DISTRICT COURT
JUL 27 2007
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANK BUTLER, Petitioner, vs. BEN CURRY, Warden Respondent.	Case No. CV 06-7576-JVS (RNB) **JUDGMENT**

Pursuant to the Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that a conditional writ of habeas corpus is granted, and that petitioner's upper term sentence is modified to a middle term sentence, unless within ninety (90) days of the entry of the Judgment, he is re-sentenced by the State in compliance with Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), Blakely v. Washington, 542 U.S. 296, 124 S, Ct. 2531, 159 L. Ed. 2d 403 (2004), and United States v.

Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), as applied in Cunningham v. California, – U.S. –, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007).

DATED: 7-26-07

/S/
JAMES V. SELNA
UNITED STATES DISTRICT JUDGE

APPENDIX D

FILED - SOUTHERN DIVISION
CLERK, U.S. DISTRICT COURT
JUL 27 2007
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANK BUTLER, Petitioner, vs. BEN CURRY, Warden Respondent.	Case No. CV 06-7576-JVS (RNB) ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all the records and files herein, and the recommendation of the United States Magistrate Judge. Objections to the Report and Recommendation have been filed herein. Having made a de novo determination of those portions of the Report and Recommendation to which objection has been made, the Court concurs with and adopts the findings, conclusions and recommendations of the Magistrate Judge.

IT THEREFORE IS ORDERED that Judgment be entered granting a conditional writ of habeas corpus and ordering that petitioner's upper term sentence be modified to a middle term sentence, unless within ninety (90) days of the entry of the Judgment, he is re-sentenced by the State in compliance with Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), as applied in

Cunningham v. California, – U.S. –, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007).

DATED: 7-26-07

/S/
JAMES V. SELNA
UNITED STATES DISTRICT JUDGE

APPENDIX E

FILED - SOUTHERN DIVISION
CLERK, U.S. DISTRICT COURT
JUN 13 2007
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANK BUTLER, Petitioner, vs. BEN CURRY, Warden Respondent.	Case No. CV 06-7576-JVS (RNB) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable James V. Selna, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

PROCEEDINGS

On November 29,2006, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody herein. Thereafter, the Court issued an Order Requiring Response to Petition. On December 27, 2006, petitioner filed a First Amended Petition ("FAP"). On March 5, 2007, following two extensions of time, respondent filed a Motion to Dismiss the FAP, on the ground that the sentencing error claim alleged in Ground Two had "been rendered" unexhausted by the Supreme Court's recent decision in Cunningham v. California, – U.S. –, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007). Based on its review of the Motion to

Dismiss, the Court issued a Minute Order on March 6, 2007 advising petitioner that he need not file opposition to the Motion to Dismiss because the Court intended to issue a Report and Recommendation recommending its denial. The Court issued that Report and Recommendation on March 7, 2007. On March 16, 2007, petitioner filed a Motion for Leave to File Second Amended Petition. In a Minute Order issued on March 19, 2007, the Court advised petitioner that it would not take any action on his motion or order respondent to respond to it until the District Court had issued its decision on the Report and Recommendation.

On March 21, 2007, respondent filed objections to the March 7, 2007 Report and Recommendation. Over those objections, the District Court issued an Order Adopting Report and Recommendation of United States Magistrate Judge on April 10, 2007. In that Order, the District Court expressly rejected inter alia respondent's argument, raised for the first time in his objections to the March 7, 2007 Report and Recommendation, that Cunningham constituted an intervening change in federal law because it announced a "new rule" under Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 102 L. Ed. 2d 334 (1989).

In light of the District Court's adoption of the Report and Recommendation, in a Minute Order issued the same day, the Court indicated that it would take up the matter of petitioner's motion for leave to file a Second Amended Petition. The Court construed petitioner's motion as simply a request by petitioner to voluntarily withdraw the ineffective assistance of counsel claim raised in Ground One of the First Amended Petition, and to proceed only on the sentencing error claim alleged in Ground Two. Accordingly, the Court granted petitioner's request and ordered respondent to address only petitioner's sentencing error claim in the Answer. The Court also ordered respondent to address the form of habeas relief that should

be granted if the Court were to conclude that habeas relief was warranted.

On May 10, 2007, respondent filed an Answer to FAP ("Ans."), along with a supporting Memorandum of Points and Authorities ("Ans. Mem."). In a Minute Order issued on May 14, 2007, the Court instructed petitioner to confine his Reply to respondent's arguments that (a) the state courts' decision to uphold the upper term sentence was reasonable because the sentence was partly based on petitioner's prior conviction; and (b) any error was harmless. The Court instructed petitioner that he need not address respondent's Teague argument or respondent's argument that the California courts' rejection of petitioner's claim was not an unreasonable application of clearly established Supreme Court precedent because the outcome in Cunningham was not a foregone conclusion, as the District Court's order adopting the Report and Recommendation was dispositive of both arguments. The Court also instructed petitioner to address respondent's contentions regarding the form of habeas relief to which petitioner is entitled, assuming the Court concluded that habeas relief was warranted. Petitioner filed a Reply on May 24, 2007, and a follow-up clarification on May 29, 2007.

Thus, this matter now is ready for decision. For the reasons discussed hereafter, the Court recommends that habeas relief be conditionally granted.

PROCEDURAL HISTORY

On April 2, 2003, a Los Angeles County Superior Court jury found petitioner guilty of corporal injury to spouse, and assault with a deadly weapon or by means of force likely to produce great bodily injury. The jury also found true the sentence enhancement allegations that petitioner had personally used a deadly and dangerous weapon, and had inflicted great bodily injury during the

commission of these crimes. (See Clerk's Transcript on Appeal ["CT"] 96-97; 2 Reporter's Transcript on Appeal ["RT"] 286-88). On April 8, 2003, the trial court sentenced petitioner to state prison for a total term of eight years, consisting of the upper term of four years on the corporal injury to spouse count, plus three years for the great bodily injury enhancement and one year for the weapon enhancement. (See CT 104; 3 RT 303-04).

On direct appeal, petitioner raised an ineffective assistance of counsel claim and a sentencing error claim corresponding to the two grounds for relief originally alleged in the FAP herein (prior to petitioner's withdrawal of the ineffective assistance of counsel claim). The California Court of Appeal ultimately rejected these claims in an unpublished decision issued September 28, 2005. (See Respondent's Lodgment ["Lodgment"] Nos. 3, 5, 7, 11). With respect to petitioner's sentencing error claim, the Court of Appeal ruled that, under People v. Black, 35 Cal. 4th 1238, 113 P.3d 534 (2005),[1] California's determinate sentencing law did not violate the United States Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). (See Motion Exh. D; Lodgment No. 11).

Petitioner's first collateral challenge to the judgment of conviction took the form of a habeas petition filed in the California Court of Appeal raising an ineffective assistance of counsel claim. The Court of Appeal summarily denied that petition without comment or citation of authority on

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1. People v. Black was later vacated and remanded by Black v. California, – U.S. –, 127 S. Ct. 1210, 167 L. Ed. 2d 36 (2007), in light of Cunningham.

April 18, 2006. (See Lodgment Nos. 12, 13). Next, petitioner filed a habeas petition in the California Supreme Court raising the same ineffective assistance of counsel and sentencing error claims raised on direct review. (See Motion Exh. E; Lodgment No. 14). The California Supreme Court summarily denied that petition on November 15, 2006. (See Motion Exh. F; Lodgment No. 15).

SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

Since petitioner is not contesting the sufficiency of the evidence to support the conviction, the following summary is taken from the California Court of Appeal opinion (see Lodgment No. 11 at 2):

> *"Daria Butler, [petitioner's] wife, testified that she had an argument with [petitioner]. While standing behind her, he struck her on the head with an iron. She said, "I was cowering down to get away from him . . . the blows kept coming." Daria called the police. She said she gave "them as much of a statement as I could before the paramedics came to bandage me up and take me to the hospital." [¶] [Petitioner] testified that Daria attacked him with a knife. In self-defense he hit her with an iron "three or four [times] before the iron broke." He said Daria did not appear to be wounded. [¶] In rebuttal, Laquan Butler, [petitioner's] son, testified that he came into the room after the incident and saw no knife. Barbara Butler, Laquan's sister, testified that when she entered the room she saw blood everywhere. She did not see a knife. [¶] Without objection, the prosecution introduced several enlarged photographs showing the tra.. of*

Daria's blood at various places at the crime scene. The photographs also depicted injuries to her hand and head."

PETITIONER'S SOLE CLAIM

Petitioner's sole claim is that his right to proof beyond a reasonable doubt and a jury trial under the Sixth and Fourteenth Amendments was violated by the trial court's imposition of the upper sentencing term in Count I based on findings made by the trial court itself. (See FAP at 5; FAP Mem. at 6a-6m).

STANDARD OF REVIEW

The standard of review applicable to petitioner's claims herein is set forth in 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

> "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings."

Under the AEDPA, the "clearly established Federal law" that controls federal habeas review of state court decisions consists of holdings (as opposed to dicta) of

Supreme Court decisions "as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

Although a particular state court decision may be both "contrary to" and "an unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. See Williams, 529 U.S. at 391, 413. A state court decision is "contrary to" clearly established federal law if the decision either applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. See Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam); Williams, 529 U.S. at 405-06. When a state court decision adjudicating a claim is contrary to controlling Supreme Court law, the reviewing federal habeas court is "'unconstrained by § 2254(d)(1)." Williams, 529 U.S. at 406. However, the state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." Early, 537 U.S. at 8.

State court decisions that are not "contrary to" Supreme Court law may only be set aside on federal habeas review "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or are based on 'an unreasonable determination of the facts.'" Early, 537 U.S. at 11 (citing 28 U.S.C. § 2254(d) and adding emphasis). A state court decision that correctly identified the governing legal rule may be rejected if it unreasonably applied the rule to the facts of a particular case. See Williams, 529 U.S. at 406-10, 413 (e.g., the rejected decision may state Strickland rule correctly but apply it unreasonably); Woodford v. Visciotti, 537 U.S. 19, 24-27, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (per curiam). However, to obtain federal habeas relief for such an

"unreasonable application," a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." Woodford, 537 U.S. at 24-27; Williams, 529 U.S. at 413. An "unreasonable application" is different from an erroneous or incorrect one. See Williams, 529 U.S. at 409-10; see also Woodford, 537 U.S. at 25; Bell v. Cone, 535 U.S. 685, 699, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002).

DISCUSSION

In imposing sentence in this matter, the trial court itself, by a preponderance of the evidence, found two aggravating factors, which in its view, justified imposition of the upper term sentence: (1) that petitioner was on probation at the time the crime was committed, and (2) that the victim was "particularly vulnerable." (See 3 RT 303-04; Cal. R. Ct. 4.421(a)(3); 4.421(b)(4)).[2/]

A. Applicable Law

In Apprendi v. New Jersey, 530 U.S. at 468, the Supreme Court considered "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." Defendant Charles Apprendi had pled guilty to two counts of second-degree possession of a firearm for an unlawful purpose (Counts 3 and 18) and one count of third-degree unlawful possession of an

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2. In imposing the upper term, the trial court weighed these two aggravating circumstances against the one factor in mitigation that it also had found: petitioner's lack of a prior record. (See 3 RT 303).

antipersonnel bomb (Count 22) after he fired several bullets into the home of an African-American family who had recently moved into a previously all-white neighborhood. See id. at 469. Following a hearing on the matter, the trial judge found by a preponderance of the evidence that the crime had been motivated by racial bias, and applying the state's hate crime statute, imposed a sentence of 12 years on Count 18. The maximum term for that charge alone was 10 years. See id. at 470-71. The Supreme Court recognized that it had "often noted that judges in this country have long exercised discretion . . . in imposing sentence *within statutory limits* in the individual case" based on a consideration of factors relating both to the offense and the offender. See id. at 481 (italics in original). However, the New Jersey statute authorized punishment beyond the statutory maximum based on a finding made by the judge by a preponderance of the evidence. The Supreme Court found the statute unconstitutional and held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." See id. at 490-92.

In Blakely v. Washington, 542 U.S. at 298, the defendant pled guilty to kidnaping his estranged wife. The facts admitted in the plea, by themselves, supported a maximum sentence of 53 months. However, the trial court imposed an "exceptional" sentence of 90 months after it determined that the defendant had acted with "deliberate cruelty." The defendant challenged the sentencing procedure on the grounds that it deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts "legally essential" to his sentence. See id. at 301. The state argued that Apprendi had not been violated because the "statutory

maximum" was not the 53-month maximum specifically set forth in the kidnaping statute, but rather, the 10 year maximum for class B felonies generally (of which kidnaping was one). See id. at 303. The Supreme Court rejected the state's argument, noting that the precedents make clear that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (Internal citations omitted) (Italics in original). Or, in other words, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." See id. at 303-04 (italics in original). The Supreme Court remanded for further proceedings.

Subsequently, in United States v. Booker, 543 U.S. at 227, the Supreme Court considered whether application of the Federal Sentencing Guidelines in two separate cases violated the Sixth Amendment. Defendant Booker had been found guilty of possession with intent to distribute at least 50 grams of cocaine base (crack), which carried a sentence of 10 years to life in prison. Based on Booker's criminal history and the quantity of drugs found by the jury, the Sentencing Guidelines required the District Court Judge to select a "base" sentence of not more than 21 years, 10 months. However, at a post-trial sentencing proceeding, the judge found by a preponderance of the evidence other factors which mandated a sentence between 30 years and life. A 30-year sentence was subsequently imposed. In the second case, defendant Fanfare was convicted by a jury of conspiracy to distribute and to possess with intent to distribute at least 500 grams of cocaine. The maximum sentence based on the jury verdict alone was 6 1/2 years. The judge made additional findings which would have required an enhanced sentence of 15 or 16 years. However,

as Blakely had been issued just days before, the District Court Judge concluded that he could not impose the higher sentence, and imposed a sentence "based solely upon the jury verdict in this case." See id. at 228-29. The Supreme Court reaffirmed its holding in Apprendi, found that "the Sixth Amendment as construed in Blakely" did apply to the Sentencing Guidelines, and invalidated two provisions of the Sentencing Reform Act of 1984, which provisions had had the effect of making the Guidelines mandatory. See id. at 226-27, 243-46, 258-65. Further, federal sentences on review would be subject to a review for reasonableness. See id. at 260-62.

Finally, in Cunningham, 127 S. Ct. at 868, the Supreme Court invalidated California's determinate sentencing scheme on the basis that it violated Apprendi's "bright-line rule," i.e., that "Except for a prior conviction, 'any fact that increases the penalty beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" The Supreme Court found that the middle term described in the California statutes constituted the relevant statutory maximum, and that because aggravating circumstances were found by a judge and not a jury, and need only be established by a preponderance of the evidence, the sentencing scheme violated Apprendi. See id. Further, the California Supreme Court's attempt to type the determinate sentencing scheme a "reasonableness constraint" in People v. Black, 35 Cal.4th at 1261 (2005) did not save it – the reasonable requirement Booker anticipated in the federal system operated within the Sixth Amendment constraints, not as a substitute for them. See id. at 870.

B. Analysis

1. Initial matters

In his Answer, respondent has again made the argument that Cunningham announced a new rule of law under Teague. (See Ans. Mem. at 6-12). Although respondent has separately argued that the California courts' rejection of petitioner's claim was not an unreasonable application of clearly established Supreme Court precedent because the outcome in Cunningham was not a foregone conclusion (see Ans. Mem. at 12-16), in the Court's view, this latter argument merely is a variation on the first – i.e., that precisely because Cunningham announced a "new rule," the state court's rejection of petitioner's Apprendi claim was not an unreasonable application of clearly established Supreme Court law. Neither argument will be addressed in this Report and Recommendation because the District Court's order adopting the March 7, 2007 Report and Recommendation disposed of both arguments. The District Judge expressly found that Cunningham did not announce a new rule, but rather merely applied the "bright line" rule announced in Apprendi to California's determinate sentencing law. The District Judge concluded in this regard: "Whatever uncertainty may have existed after Apprendi, or even after Apprendi and Blakely, was dispelled by Booker. By that point, the rule had been announced, and Cunningham did no more than apply it. Therefore respondent's Teague argument fails." Further, the District Court observed: "The Cunningham court's analysis of the California Supreme Court's Black decision went beyond mere disagreement with the 'reasonable jurists' of the California Supreme Court. Justice Ginsburg's opinion reflects that the majority found the opinion of the California Supreme Court to actually be an unreasonable application of Sixth

Amendment precedent."

2. The only issue is whether the Apprendi error was harmless.

Respondent is unable to dispute that Apprendi error occurred at least with respect to one of the two aggravating factors cited by the trial court. Therefore, the only remaining issue to be determined is whether the Apprendi error was harmless.

a. The applicable harmless error standard

In Washington v. Recuenco, – U.S. –, 126 S. Ct. 2546, 2551-2553, 165 L. Ed. 2d 466 (2006), the Supreme Court held that the failure to submit a sentencing factor to the jury is not structural error, but rather is subject to harmless error analysis, and that the Government bears the burden of showing that the error was harmless beyond a reasonable doubt. Although Recuenco was a direct review case, the Ninth Circuit subsequently held in Stokes v. Schriro, 465 F.3d 397, 404 (9th Cir. 2006), that the same harmless error standard applied to Apprendi error on federal habeas review of a state court sentence.

However, the Court is unable to reconcile the Ninth Circuit's holding in Stokes with the Supreme Court's recent decision in Fry v. Pliler, No. 06-5247, 2007 WL 1661463 (U.S. June 11, 2007). In Fry, the Supreme Court considered whether the Brecht standard applied on federal habeas review of a state court judgment even where the state court failed to recognize the constitutional error and did not review it for harmlessness under Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The Supreme Court held that "in § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the

'substantial and injurious effect' standard set forth in Brecht," regardless of whether the state appellate court recognized the error and applied Chapman. See Fry, 2007 WL 1661463, at *6. It reasoned, in part, that Brecht itself "assumed that the Kotteakos[3] standard would apply in virtually all § 2254 cases . . . suggest[ing] an exception only for the 'unusual case' in which 'a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct . . . infect[s] the integrity of the proceeding.'" See Fry, 2007 WL 1661463, at *3.

The Court therefore concurs with respondent that the Brecht standard applies here. However, the Court disagrees with respondent that it is petitioner's burden under Brecht "to show that the alleged error had a substantial and injurious effect or influence in determining the jury's verdict." (See Ans. Mem. at 16). In the first place, the issue is not whether the Apprendi error had a substantial and injurious effect or influence in determining the jury's verdict, but rather whether the error had a substantial and injurious effect or influence on petitioner's sentence. See Hoffman v. Arave, 236 F.3d 523, 540 (9th Cir.) (applying Brecht standard to sentencing error), cert. denied, 534 U.S. 944 (2001). Second, it is not petitioner's burden to show that the error was not harmless. In O'Neal v. McAninch, 513 U.S. 432, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995), the Supreme Court stated that "[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had [a] 'substantial and injurious effect or influence in determining the jury's

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3. Kotteakos v. United States, 328 U.S. 750, 776, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946) (an error is harmless unless it "had substantial and injurious effect or influence in determining the jury's verdict").

verdict,' that error is not harmless. And, the petitioner must win." Id. at 436. The Supreme Court further explained that, by "grave doubt," it meant that, "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." Id. at 435; see also Payton v. Woodford, 299 F.3d 815, 828 (9th Cir. 2002) (en bane) (holding that "it is the State that bears the 'risk of doubt'" and that petitioner is "entitled to the benefit of the doubt"), vacated on other grds, 538 U.S. 975 (2003); Rios v. Rocha, 299 F.3d 796, 813 (9th Cir. 2002); Lord v. Wood, 184 F.3d 1083, 1096 (9th Cir. 1999), cert. denied, 528 U.S. 1198 (2000).

b. Whether Apprendi error occurred with respect to the trial court's finding that petitioner was on probation at the time the crime was committed

Respondent contends that no Apprendi error occurred with regard to the finding that petitioner was on probation at the time the crime was committed because that aggravating factor falls within Apprendi's "prior conviction" exception. Respondent further contends that even if the jury were required to find this aggravating circumstance beyond areasonable doubt, it would have. (See Ans. Mem. at 14, 17).

Though the Court has been unable to find any Supreme Court case law directly on point, the rationale at least partially underpinning the Supreme Court's decision in Shepard v. United States, 544 U.S. 13, 24-27, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005) (plurality) is instructive. In Shepard, the Supreme Court considered the scope of evidence a trial judge may consider in determining whether a defendant's sentence is properly enhanced under the Armed Career Criminal Act ("ACCA"), which mandates an increased sentence for anyone possessing a firearm after

three prior convictions for serious drug offenses or violent felonies. See id. at 15. The ACCA defined burglary as a violent felony only if committed in a building or enclosed space ("generic burglary"), not in a boat or motor vehicle. See id. at 16. The Supreme Court had earlier held that a district court sentencing under the ACCA could look to statutory elements, charging documents, and jury instructions to determine whether an earlier conviction after trial was for generic burglary. In Shepard, the issue was whether a sentencing court could look to police reports or complaint applications to determine whether an earlier guilty plea *necessarily* admitted and supported a conviction for (generic) burglary. See id. A four-member plurality of the Court, in a judgment joined by Justice Thomas, limited the trial court's inquiry to the terms of the charging documents, the terms of a plea agreement or transcript of plea colloquy in which the factual basis for the plea was confirmed by the defendant, or to "some comparable judicial record of this information." See id. at 26. In Section III of the opinion, four justices found "further reason" to adhere to the "demanding requirement that any sentence under the ACCA rest on a showing that a prior conviction 'necessarily' involved . . . facts equating to generic burglary." See id. at 24. Citing, inter alia, Apprendi, the justices expressed doubt regarding the constitutionality of any inquiry into the disputed finding of fact regarding what the defendant and state judge must have "understood" as the factual basis for the prior plea. The justices cautioned that, "[w]hile the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record . . ." to be clearly authorized by precedent. See id. at 25. Justice Thomas expressly declined to join Section III of the opinion because in his view, in light of Apprendi and its progeny, the factfinding procedure the

Court rejected gave "rise to constitutional error, not doubt." See id. at 28.

In addition, Ninth Circuit case law, though again not directly on point, is also instructive. In United States v. Kortgaard, 425 F.3d 602, 607-11 (9th Cir. 2005), the Ninth Circuit concluded that findings relating to the "seriousness" of a defendant's past misconduct and a defendant's "likelihood" of recidivism are not defined by statute and require a judge's exercise of discretion, thereby falling outside Apprendi's prior conviction exception. In other words, "These determinations do not follow necessarily from the fact of any prior conviction or sentence but instead call for the judgment of a factfinder." See id. at 608-09. By contrast, no Apprendi violation occurs where a judge makes a finding relating to whether the prior conviction was a "violent felony" or "crime of violence," because these are defined by statute and certain enumerated elements, and "are essentially in-or-out, categorical classifications of individual offenses that follow necessarily from the elements ofthe conviction and jury-found or admitted facts." See id. at 607.

The language from these Supreme Court and Ninth Circuit cases suggests that probation status, as a "fact about a prior conviction," Shepard, 544 U.S. at 25, which "follow[s] necessarily" from the prior conviction or sentence and which does not "call for the judgment of a factfinder," Kortgaard, 425 F.3d at 609, falls within Apprendi's prior conviction exception. Case law from other Circuits suggests the same. See United States v. Fagans, 406 F.3d 138, 141-42 (2d. Cir 2005) ("The PSR noted, without objection by the Defendant, that he was serving a term of 6-12 months probation at the time of the offense. These 'fact[s] of a prior conviction' do not implicate Defendant's Sixth Amendment rights."); United States v. Corchado, 427 F.3d 815, 820 (10th Cir. 2005) ("the

enhancement of Defendant's criminal history category based on his probation status did not violate the Sixth Amendment"); see also United States v. Kempis-Bonola, 287 F.3d 699,703 (8th Cir. 2002) (Regarding Apprendi's prior conviction exception, "it is entirely appropriate for judges to have 'the task of finding not only the mere fact of previous convictions but other related issues as well'") (internal citations omitted)); United States v. Santiago, 268 F.3d 151, 156 (2d. Cir. 2001) (as amended) ("[t]he determination of 'the fact of a prior conviction' implicitly entails many subsidiary findings"), cert. denied, 535 U.S. 1070 (2002).

Based on the foregoing authority, the Court concurs with respondent that no Apprendi error occurred here when the trial court found by a preponderance of the evidence that petitioner was on probation at the time the crime was committed.[4]

c. Whether the jury would have found that the victim was particularly vulnerable

It is beyond dispute that the issue of the victim's particular vulnerability was a factor the jury was required to find beyond a reasonable doubt as it does not fall within Apprendi's prior conviction exception.[5] Respondent

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4. Moreover, even if Apprendi error did occur with respect to this first aggravating factor, the error was harmless because the Court does not have "grave doubt," but rather has no doubt that the jury would have found this aggravating factor beyond a reasonable doubt. The probation report prepared at trial indicated that petitioner was on probation at the time the crime was committed, and petitioner did not contest at sentencing the prior conviction or the trial court's finding that he was on probation at the time the crime was committed. (See Lodgment No. 12, Exhibit; 3 RT 299-306).

5. Respondent's contention that "the trial court's additional (continued...)

contends that this Apprendi error was harmless, though, because the jury would have found this factor beyond a reasonable doubt. (See Ans. Mem. at 17).

Under California law, "Particularly . . . means in a special or unusual degree, to an extent greater than in other cases. Vulnerability means defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the defendant's criminal act." People v. Smith, 94 Cal. App. 3d 433, 436, 156 Cal. Rptr. 502, (1979). In other words, "[a]n attack upon a vulnerable victim takes something less than intestinal fortitude. In the jargon of football players, it is a cheap shot." See id. As examples of this, the firing of multiple shots at an incapacitated victim constitutes "particular vulnerability," People v. White 117 Cal. App. 3d 270, 282, 172 Cal. Rptr. 612 (1981), disapproved on other grds by People v. Scott, 9 Cal.4th 331, 353, 36 Cal. Rptr. 2d 627, 885 P.2d 1040 (1994) (as modified), as does shooting a sleeping victim, see People v. Loudermilk, 195 Cal. App. 3d 996, 1007, 241 Cal. Rptr. 208 (1987).

Here, the evidence presented at trial established that petitioner attacked the victim from behind, hitting her multiple times with an iron until it broke. (See 1 RT 64-72). Photographs introduced at trial corroborated that the victim was hit on the back of the head. (See 1 RT 73-74).

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5. (...continued)
aggravating circumstance finding [i.e., the particular vulnerability of the victim] . . . did not violate Cunningham" because the trial court could impose the upper term based solely on the probation status finding (see Ans. Mem. at 16), is wholly unsupported by any citation to law, and is in fact, entirely inaccurate. Respondent has conflated the issue of whether Apprendi error occurred with the issue of whether that error was harmless. While the trial court may have been authorized to impose an upper term sentence based solely on the probation status finding, the trial court did not do so here.

Though petitioner testified that he had hit his wife only in self-defense (see 1 RT 165-68), in finding petitioner guilty, the jury implicitly rejected petitioner's self-defense argument. Thus, it certainly is *possible* that the jury would have found beyond a reasonable doubt that the victim was particularly vulnerable.

However, it seems to the Court that it also is *possible* that the jury would not have been convinced beyond a reasonable doubt that this victim was particularly vulnerable. First, under California law, a victim is not "particularly vulnerable" where all victims of that crime are properly considered vulnerable. See People v. Bloom, 142 Cal. App. 3d 310, 322, 190 Cal. Rptr. 857 (1983) (drunk driving). The jury here may well have viewed the victim as no more vulnerable than any other victim of domestic violence in the home. Second, the testimony at trial established that petitioner and the victim had been engaged in an on-and-off argument throughout the day regarding a letter she had received from her first husband. Immediately preceding the crime, petitioner had cursed and screamed at the victim and she testified that she felt threatened. Petitioner accused her of lying, grabbed her roughly by her forearms, and indicated that he was "tired of this" and that "it's not working." The victim then retrieved a suitcase from the closet and put it on the bed for petitioner. At this point, petitioner began striking her with the iron from behind. (See 1 RT 64-68). Based on this evidence – that just minutes before petitioner had threatened, verbally abused, and grabbed her – petitioner could have argued and the jury could reasonably have concluded that the victim was not totally unguarded when petitioner struck her.

If it were petitioner's burden under Brecht to prove that the Apprendi error with respect to the second aggravating factor was not harmless, the Court might very

well be inclined to find and conclude that petitioner had not met that burden. However, as noted above, it is not petitioner's burden to prove that the error was not harmless. Because it is respondent here who bears the risk of doubt as to whether the jury, applying the reasonable doubt standard, would have reached the same conclusion as the trial judge with respect to the second aggravating factor, and because petitioner is entitled to the benefit of the doubt, the Court is compelled to find and conclude that the Apprendi error with respect to the second aggravating factor was not harmless.

d. Whether the trial court would have imposed the upper term sentence absent the Apprendi error

Under California law, the trial judge need only find one aggravating circumstance in order to expose a criminal defendant to the upper term.[6/] See People v. Banks, 149 Cal. App. 4th 969, 973 (2007) (one aggravating factor is

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6. Respondent has raised the additional argument in the Answer that because it was only necessary to find one aggravating factor to impose the upper term, the finding of particular vulnerability was, in essence, superfluous, and therefore, the state court's rejection of petitioner's claim was not an unreasonable application of Supreme Court law. (See Ans. Mem. at 1). However, under Ylst v. Nunnemaker, 501 U.S. 797, 803-04, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991), it may be presumed that the California Supreme Court, by its silent denial of petitioner's habeas petition raising the same claim, did not intend to change the California Court of Appeal's reasoned decision rejecting it. The California Court of Appeal did not reject petitioner's claim because it found the Apprendi error harmless. Rather, it rejected petitioner's claim in light of the California Supreme Court's decision in (the now vacated) People v. Black, which expressly found that California's sentencing scheme did not implicate the Sixth Amendment. (See Lodgment No. 11). Without question, this was an unreasonable application of clearly established Supreme Court law.

sufficient to expose defendant to upper term); People v. Burch, 148 Cal. App. 4th 862, 873 (2007) (same). Therefore, respondent also argues, any Apprendi error here was harmless because the sentence was based partly on petitioner's probation status. (See Ans. Mem. at 16-17). However, it does not follow from the fact that the judge *could have* imposed the upper term based solely on petitioner's probation status that the judge *would have* imposed the upper term based solely on that aggravating circumstance. See United States v. Lyons, 454 F.3d 968, 973 (9th Cir. 2006) (the record does not show that the district court would have imposed the same sentence even if the government is correct that the evidence supporting the upward departure was overwhelming and uncontroverted). The Court notes in this regard that the trial judge here was very explicit that *on balance*, the *two* factors in aggravation outweighed the one factor in mitigation (petitioner's lack of prior record), and therefore warranted the imposition of the upper term: "So when I look at the factors that I cited in aggravation against the one factor in mitigation, the factors in aggravation outweigh the factor in mitigation. The court selects the high term of four years in state prison on Count 1." (See 3 RT 303-04). Thus, while it is *possible* that the trial court would have imposed the same sentence based solely on petitioner's probation status, the Court cannot help but have "grave doubt" that the trial court would have done so.[7] Accordingly, the Court also rejects respondent's other

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7. Compare Banks, 149 Cal. App. 4th at 974 ("[T]he trial court in this case cited several additional factors to support its choice of the upper term on count 1, and also did not declare defendant's prior criminal record alone would support its decision . . . we are not convinced the trial court would have imposed the same sentence solely because of defendant's prior criminal history . . . .") with People v.

(continued...)

argument as to why any Apprendi error here was harmless. Instead, the Court finds and concludes that habeas relief is warranted on petitioner's Apprendi claim.

C. Appropriate Relief

In the Minute Orders issued by this Court on May 10, 2007 and May 14, 2007, the Court instructed the parties to brief the issue of the appropriate form of habeas relief if the Court were to determine that habeas relief was warranted.

In his Answer, respondent contends that any habeas relief granted should be conditional such that the Court orders petitioner's upper term sentence modified to the midterm unless petitioner is sentenced in compliance with Cunningham within ninety (90) days of entry of judgment. (See Ans. Mem. at 18). In his Reply, petitioner contends that any habeas relief should be unconditional so that he is immediately released. (See Reply at 15).

The Court agrees with respondent that the habeas relief granted should be conditional since, as discussed above, the trial judge could technically impose an upper term sentence based solely on petitioner's probation status.

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) approving and adopting

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7. (...continued)
Perez, 148 Cal. App. 4th 353, 372 (2007) (as modified) ("The court cited defendant's numerous prior criminal convictions as a basis for imposing the upper term and stated this factor alone justified the upper term. Consequently, the court's consideration of other aggravating factors that were not submitted to the jury was harmless because one valid aggravating factor is sufficient to expose defendant to the upper term.").

this Report and Recommendation; (2) directing that Judgment be entered granting a conditional writ of habeas corpus and ordering that petitioner's upper term sentence be modified to a middle term sentence, unless within ninety (90) days of the entry of the Judgment, he is re-sentenced by the State in compliance with Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), as applied in Cunningham v. California, – U.S. –, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007).

DATED: June 12, 2007

/S/
ROBERT N. BLOCK
UNITED STATES MAGISTRATE JUDGE

APPENDIX F

FILED - SOUTHERN DIVISION
CLERK, U.S. DISTRICT COURT
APR 10 2007
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANK BUTLER,	)	Case No.
	)	CV 06-7576-JVS (RNB)
Petitioner,	)	
	)	ORDER ADOPTING
vs.	)	REPORT AND
	)	RECOMMENDATION
BEN CURRY, Warden	)	OF UNITED STATES
	)	MAGISTRATE JUDGE
Respondent.	)	
	)	

On March 5, 2007, respondent filed a Motion to Dismiss the operative First Amended Petition herein, on the ground that the claim alleged in Ground Two is unexhausted. On March 7, 2007, the assigned Magistrate Judge issued a Report and Recommendation ("R&R"), wherein he recommended the denial of the Motion to Dismiss. Respondent has filed timely objections to the R&R, and the Court has made a de novo determination of those portions of the R&R to which objections have been made in accordance with 28 U.S.C. § 636(b)(l)(B). For the reasons discussed hereafter, the Court concurs with and adopts the findings, conclusions and recommendations of the Magistrate Judge.

In the Motion to Dismiss, respondent's position was premised on the notion that a claim that was exhausted in

the state court may become unexhausted if an intervening change in federal law casts the legal issue in a fundamentally different light. Respondent contended that Cunningham constituted such a change in federal law. (See Motion to Dismiss ["MTD"] at 2). In support of this contention, respondent cited several cases. However, as the Magistrate Judge noted in the R&R, each of those cases involved the pronouncement of a new rule of constitutional law by the U.S. Supreme Court. See, e.g., Blair v. California, 340 F.2d 741, 743-44 (9th Cir. 1965) (analyzing exhaustion in light of the intervening Supreme Court decision in Douglas v. California, which first granted indigent defendants the right to counsel on appeal); Campanale v. Harris, 724 F.2d 276, 280 (2d Cir. 1983) (analyzing exhaustion in light of the "new constitutional rule" announced in the intervening Supreme Court decision in Doyle v. Ohio); St. Pierre v. Helgemoe, 545 F.2d 1306 (1st Cir. 1976) (finding relief "at least temporarily" barred in federal habeas court because petitioner must allow state court opportunity to examine petitioner's claim, made in light of Henderson v. Morgan, which worked a "significant retroactive change in the law"). In the Magistrate Judge's view, Cunningham did not purport to announce a new rule of constitutional law, and in the Motion to Dismiss, respondent made no argument that it did. Instead, respondent made only the conclusory allegation that Cunningham "cast the constitutionality of California's sentencing scheme in a fundamentally different light by rejecting the California Supreme court's [sic] contrary decision in Black." (See MTD at 5). The Magistrate Judge rejected respondent's argument as misplaced.

In the Objections, however, respondent *now* theorizes that Cunningham constituted an intervening change in federal law because it did announce a "new rule" under Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 102 L. Ed. 2d

334 (1989). (See Objections Memorandum ["Obj. Mem."] at 4). The Court disagrees.

In Teague v. Lane, the Supreme Court held that, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." See 489 U.S. 310. Under Teague, the new rule will be applied or announced in cases on collateral review only if it falls into one of two exceptions. See id. at 311-13.

To determine whether a habeas petitioner is entitled to the application of a particular rule, the habeas court performs a three-step analysis under Teague: (1) the date on which the defendant's conviction became final is determined; (2) the habeas court considers whether the rule is new;[1] and (3) if the rule is new, the court determines whether the rule nonetheless falls within one of the two narrow exceptions to the Teague doctrine. See O'Dell v. Netherland, 521 U.S. 151, 156, 117 S. Ct. 1969, 138 L. Ed. 2d 351 (1997).

"In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." See Teague, 489 U.S. at 301. Put another way, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final," see id. at 301, or put yet another way, "the unlawfulness of [the] conviction was apparent to all reasonable jurists," Lambrix

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1. A rule may be "new" either because the decision relied upon by the habeas petitioner itself announced a new rule after his conviction became final, or because the habeas petitioner seeks to apply a prior decision's "old rule" to a novel setting, such that relief would create a new rule by the extension of the precedent. See Stringer v. Black, 503 U.S. 222, 228, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992). Respondent's argument solely is that Cunningham itself announced a new rule.

v. Singletary, 520 U.S. 518, 527-28, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997).

Respondent seizes on the "dictated by precedent" and "apparent to all reasonable jurists" language of the Teague doctrine to argue that Cunningham has created new constitutional law.[2] Respondent contends that the fact that the Supreme Court has *"now"* decided that the DSL violates Blakely does not mean that reasonable jurists would have been compelled to reach that conclusion *prior* to the Court's decision in Cunningham and that Cunningham therefore issued anew rule. (See Obj. Mem. at 4).

In support of this argument, respondent relies on Butler v. McKellar, 494 U.S. 407, 110 S. Ct. 1212, 108 L. Ed. 2d 347 (1990). There, the Supreme Court found that the rule announced in Arizona v. Roberson, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988) – i.e., that the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation – was a new rule despite the Roberson majority's conclusion that the decision was "directly controlled" by prior precedent. According to Butler, the Court's observation that its decision is controlled by a prior decision is not conclusive for purposes of determining whether a new rule has been announced. The analysis also is informed by whether the outcome was susceptible to debate among reasonable minds. See 414 U.S. at 415. The "'new rule' principle therefore validates reasonable, good faith interpretations of existing precedents made by state courts even though they are

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2. Although logically the various formulations of the Teague doctrine would or should be interchangeable, respondent does not even purport to argue that Cunningham breaks new ground, or imposes a new obligation on the States or the Federal Government.

shown to be contrary to later decisions." See id. at 414.

Respondent also cites to O'Dell, 521 U.S. at 165. There, the Supreme Court found the rule announced in Simmons v. South Carolina, 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994) – i.e., capital defendants are guaranteed the right to present evidence of parole ineligibility when the prosecution contends they are a future danger – to be a new rule. Simmons was not, the Supreme Court found, compelled by Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977), whose narrow holding - taken from the concurrence in the seven opinion case - was that "[a] procedure for selecting people for the death penalty which permits consideration of . . . secret information relevant to the *character and record of the individual offender*" violates the Eighth Amendment's reliability requirement in death penalty cases; nor was it compelled by or "merely a variation" of Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986), which had found unconstitutional a prohibition on the defendant's right to introduce evidence of his good behavior in prison to counter the prosecution's argument that he would pose disciplinary problems in prison if not sentenced to death. The Supreme Court noted that in Simmons, there was "no opinion" for the Court, but rather only a plurality opinion. See id. at 159. Further, the Supreme Court based its decision that Simmons issued a new rule in no small part on the fact that other Supreme Court cases comprising part of the "legal landscape" at the relevant time (when the petitioner's conviction became final) had rendered holdings suggesting that the Simmons rule was not inevitable. See id. at 163-65. Specifically, Simmons' holding had carved out an exception to the general rule announced in one of those prior decisions. "A jurist's failure to predict this [could not] . . . be deemed unreasonable." See id. at 166.

This Court finds neither Butler nor O'Dell availing. Having closely parsed the language and analysis set forth by Justice Ginsburg in Cunningham, the Court is convinced that the Supreme Court was not pronouncing a new rule under Teague.

As noted in the R&R, Justice Ginsburg summarized the Court's holding as follows (see R&R at 3-4):

> "Contrary to the Black court's holding, our decisions from Apprendi to Booker point to the middle term specified in California's statutes, not the upper term, as the relevant statutory maximum. Because the DSL authorizes the judge, not the jury to find the facts permitting an upper term sentence, **the system cannot withstand measurement against our Sixth Amendment precedent.**" (Emphasis added.)

The Supreme Court's reliance on Apprendi, Blakely, and Booker, cited as "Sixth Amendment precedent," necessarily suggests that it found its decision to be compelled by those cases. Compare Harris v. Vasquez, 949 F.2d 1497, 1512 (9th Cir. 1990) (as amended), cert. denied, 503 U.S. 910 (1992) (rejecting argument that McClesky v. Zant created a new rule with respect to the abuse of the writ standard, finding that "the inexcusable neglect standard set forth in McClesky followed directly from 'a review of [the Court's] habeas corpus precedents") with Gilmore v. Taylor, 508 U.S. 333, 341, 113 S. Ct. 2112, 124 L. Ed. 2d 306 (1993) (concluding that the circuit had announced a new rule, reasoning that Cupp v. Naughten, upon which the circuit had relied, was an "unlikely progenitor" of the rule announced). While admittedly not dispositive, Cunningham's language supports the conclusion that the case did not issue a new rule. See O'Dell, 521 U.S. at 161 n.2 (language of four justices to the

effect that the decision was "compelled" by prior precedent, while "far from conclusive," "is certainly evidence tending to prove that the rule . . . [i]s not new"); Lambrix, 520 U.S. at 528 (concluding that Espinosa v. Florida announced a new rule, and finding it "significant" that Espinosa "did not purport to rely upon any controlling precedent").

Respondent contends that the grant of review in Cunningham itself suggests that the holding was not dictated by prior precedent as the grant indicated that the "answer" was "not all clear." (See Obj. Mem. at 7). However, were that the standard for assessing whether the outcome in a Supreme Court case was, in fact, dictated by prior precedent, virtually no Supreme Court holding in a criminal case would ever be found to be dictated by prior precedent since all challenges to a criminal conviction come to the Supreme Court by means of petitions for discretionary appellate review.

Moreover, by the time petitioner's conviction became final in 2005, the Supreme Court already had issued its decisions in Apprendi, Blakely, and Booker. Respondent has pointed to no (other) Supreme Court cases comprising part of the legal landscape at the time petitioner's conviction became final that suggest that Cunningham was *not* dictated by the prior Supreme Court precedent that the Cunningham court itself specifically relied upon. While the Ninth Circuit has found that Apprendi, Blakely, and Booker all constituted "new rules," it does not, a fortiori, follow that Cunningham itself is a rule not dictated by those precedents. (See Obj. Mem. at 5-6).

The Cunningham court's analysis of the California Supreme Court's Black decision went beyond mere disagreement with the "reasonable jurists" of the California Supreme Court. Justice Ginsburg's opinion reflects that the majority found the opinion of the

California Supreme Court to actually be an unreasonable application of Sixth Amendment precedent. See Stringer v. Black, 503 U.S. 222, 237, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992) (finding that the Fifth Circuit "made a serious mistake" in concluding that Godfrey v. Georgia did not apply to Mississippi's sentencing scheme – as later held in Clemons v. Mississippi – and rejecting state's argument that Clemons was, in light of the Fifth Circuit's opinion, therefore not dictated by precedent).

Specifically, Justice Ginsburg noted that the Court's decisions "leave no room" for the type of analysis performed by the California Supreme Court – that is, "[a]sking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge" – this, "is the *very* inquiry Apprendi's 'bright-line-rule' was designed to exclude." Cunningham, 127 S. Ct. at 869. The Court noted that, "remarkably," the California Supreme Court had found that "the high court precedents do not draw a bright line." See id. Further, the Court rejected the California Supreme Court's "attempt[] to rescue" the DSL's judicial factfinding authority by "typing it simply a reasonableness constraint" equivalent to the federal system post-Booker. See id. at 870. The Court noted that, "[r]easonableness . . . is not, as the Black court would have it, the touchstone of Sixth Amendment analysis. The Court went on to note that, "Booker's remedy for the Federal Guidelines, in short, is not a recipe for rendering our Sixth Amendment case law toothless." See id. Finally, the Court rejected the respondent's argument that the Black court's construction of the DSL as consistent with the Sixth Amendment was authoritative: "the Black court did not modify California law so as to align it with this Court's Sixth Amendment precedent. . . . Rather, it construed this Court's decisions in an endeavor to render them consistent with California

law." See id. at 871 n.16.

It would appear, then, that the Supreme Court found the California Supreme Court's Black decision *anything but* a "reasonable, good faith interpretation[] of existing precedents" worthy of validation, though incorrect.

Respondent contends that the conclusion that California's sentencing scheme complied with Booker was reasonable before Cunningham, and indeed, was the very conclusion of the dissenters in Cunningham. According to respondent, two other states had similarly rejected Blakely and Booker challenges to their own determinate sentencing schemes, and thus, "[t]he large number of jurists finding that California's upper term sentencing scheme and similar statutes did not violate the Sixth Amendment demonstrates that the outcome in Cunningham was not so clear that no reasonable jurist could have reached a contrary result." (See Obj. Mem. at 8). But see State v. Natale, 184 N.J. 458, 482 (N.J. 2005) (assessing New Jersey's presumptive sentencing law and rejecting California's Black decision as in "direct conflict" with Blakely). The Court finds the lower courts' disagreements regarding the constitutionality of the presumptive sentencing scheme unpersuasive to show that the result in Cunningham was not "so clear." Both of those "two other states" equated their systems with the post-Booker federal system, utilizing the reasoning of the California Supreme Court that was expressly rejected in Cunningham. See State v. Lopez, 123 P.3d 754, 761-68 (N.M. 2005); State v. Gomez, 163 S.W.3d 631, (Tenn. 2005), judgment vacated and remanded, No. 05-296, 2007 WL 505900 (U.S. Feb. 20, 2007).[3/] Further,

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3. In any event, that "reasonable jurists" could have or did come out differently in the state courts would not ergo compel the finding that the high court issued a "new" constitutional rule. In the Court's view, the lower courts' rejection of an Apprendi/Blakely

(continued...)

contrary to respondent's contention (see Obj. Mem. at 7), the fact that the decision of the Supreme Court was not unanimous is not sufficient in itself to show that the rule is new. See Beard. v. Banks, 542 U.S. 406, 416 n.5, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004) ("Because the focus of the inquiry is whether *reasonable* jurists could differ as to whether precedent compels the sought-for rule, we do not suggest that the mere existence of a dissent suffices to show that the rule is new.").

Finally, the Court takes issue with respondent's attempt to recast the rule announced in Cunningham despite no such pronouncement by the Supreme Court. Respondent maintains that the "new rule" announced in Cunningham is that "imposition of an upper term *within* the initial prescribed sentencing range, based on a fact not found by a jury, violates the right to jury trial, even where the trial court has broad discretion that is reviewed for reasonableness." (See MTD at 6-7 (Italics in original)).

However, the Cunningham court explicitly rejected the California Supreme Court's attempt to equate its sentencing scheme with the post-Booker federal system: "Under California's system, judges are not free to exercise their 'discretion to select a specific sentence within a defined range . . . California's Legislature has adopted sentencing triads, three fixed sentences with no ranges

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3. (...continued)
challenge to a presumptive sentencing law is analogous to a state court's rejection of an ineffective assistance of counsel claim, later reversed by the high court. As Justice Kennedy noted in his concurrence in Wright v. West: "If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule." See 505 U.S. 277, 308, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992) (citing Jackson v. Virginia as an example).

between them." See Cunningham, 127 S. Ct. at 869. Moreover, the Supreme Court found the California Supreme Court's attempt to "rescue" the DSL by "typing it a reasonableness constraint" unavailing, and not "as the *Black* court would have it, the touchstone of Sixth Amendment analysis." While the Supreme Court found "comforting" that the system required "*judge-determined DSL sentences* to be reasonable," it found that constraint "beside the point." See id. 127 S. Ct. at 870 (emphasis added). That the Supreme Court would exclude from its holding mention of a "review for reasonableness" that it found "beside the point" is self-evident, and is fatal to respondent's position.

In this Court's view, the "rule" announced in Cunningham is the very rule – a "bright-line" one at that – announced in Apprendi, and applied to California's determinate sentencing law: "Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" See Cunningham, 127 S. Ct. at 868. Whatever uncertainty may have existed after to Apprendi, or even after Apprendi and Blakely, was dispelled by Booker. By that point, the rule had been announced, and Cunningham did no more than apply it. Therefore respondent's Teague argument fails.

ORDER

Respondent's Motion to Dismiss therefore is DENIED, and respondent is ORDERED to serve and file an Answer on the merits to the First Amended Petition within 30 days.

DATED: 4-9-07

/S/
JAMES V. SELNA
UNITED STATES DISTRICT JUDGE

APPENDIX G

FILED - SOUTHERN DIVISION
CLERK, U.S. DISTRICT COURT
MAR - 7 2007
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANK BUTLER,	) Case No.
	) CV 06-7576-JVS (RNB)
Petitioner,	)
	) REPORT AND
vs.	) RECOMMENDATION
	) OF UNITED STATES
BEN CURRY, Warden	) MAGISTRATE JUDGE
	)
Respondent.	)
	)

This Report and Recommendation is submitted to the Honorable James V. Selna, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

PROCEEDINGS

On March 5, 2007, following two extensions of time, respondent filed a Motion to Dismiss the operative First Amended Petition herein, on the ground that the claim alleged in Ground Two is unexhausted. Based on its review of the Motion to Dismiss, the Court issued a Minute Order on March 6, 2007, wherein the Court advised petitioner that he need not file opposition to respondent's Motion to Dismiss because the Court intended to issue a Report and

Recommendation recommending its denial.

PROCEDURAL HISTORY

On April 2, 2003, a Los Angeles County Superior Court jury found petitioner guilty of corporal injury to spouse, and assault with a deadly weapon or by means of force likely to produce great bodily injury. The jury also found true the sentence enhancement allegations that petitioner had personally used a deadly and dangerous weapon and inflicted great bodily injury during the commission of these crimes. (See Motion Exh. B).

On April 8, 2003, the trial court sentenced petitioner to state prison for a total term of eight years, consisting of the upper term of four years on the corporal injury to spouse count, plus three years for the great bodily injury enhancement and one year for the weapon enhancement. (See Motion Exh. C).

On direct appeal, petitioner alleged an ineffective assistance of counsel claim and a sentencing error claim corresponding to the two grounds for relief being alleged by him herein. The California Court of Appeal ultimately rejected these claims in an unpublished decision issued September 28, 2005. With respect to petitioner's sentencing error claim, the Court of Appeal ruled that, under People v. Black, 35 Cal. 4th 1238, 113 P.3d 534 (2005), California's determinate sentencing law did not violate the United States Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). (See Motion Exh. D).

Petitioner proceeded to file a habeas petition raising the same ineffective assistance of counsel and sentencing error claims in the California Supreme Court. (See Motion

Exh. E). That petition was denied on November 15, 2006. (See Motion Exh. F).

The filing of the original Petition herein followed on November 29, 2006.

DISCUSSION

In Ground Two of the operative First Amended Petition, petitioner contends that, under Apprendi, Blakely, and Booker, the trial court's imposition of an upper term sentence based on facts that were neither found by the jury nor admitted by petitioner violated petitioner's federal constitutional rights to a jury trial and proof beyond a reasonable doubt. (See First Amended Petition at 6a-6m).

Respondent does not dispute that petitioner "fairly presented" the same sentencing error claim to the California Supreme Court. Rather, respondent contends that petitioner's sentencing error claim has been rendered unexhausted by the Supreme Court's recent decision in Cunningham v. California, – U.S. –, 127 S. Ct. 856, 166 L. Ed 2d 856 (2007). In support of this contention, respondent has cited various federal cases for the proposition that "[t]he exhaustion requirement is not met if there is an intervening change in federal law that casts the legal issue in a fundamentally different light." (See Motion at 4-6).

In the Court's view, respondent's reliance on that proposition is misplaced. While Cunningham may have effected a change in California law, it did not effect an intervening change in federal law. Rather, as Justice Ginsberg made clear, the Supreme Court in Cunningham merely was applying the rule of Apprendi, as subsequently applied in Blakely and Booker, to California's determinate sentencing law ("DSL"). See 127 S. Ct. at 864-71. Justice Ginsberg summarized the Supreme Court's holding as follows:

> "Contrary to the Black court's holding, our decisions from Apprendi to Booker point to the middle term specified in California's statutes, not the upper term, as the relevant statutory maximum. Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, **the system cannot withstand measurement against our Sixth Amendment precedent.**" 127 S. Ct. at 871 (emphasis added).

The cases cited by respondent are distinguishable. For example, in Blair v. California, 340 F.2d 741 (9th Cir. 1965), the Ninth Circuit's holding was predicated on the Supreme Court's intervening decision in Douglas v. California, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963), which the Ninth Circuit characterized as first according constitutional standing to the right to counsel on appeal from a state conviction. See 340 F.3d at 743. In Campanale v. Harris, 724 F.2d 276 (2d Cir. 1983), the Second Circuit's decision was predicated on the Supreme Court's intervening decision in Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), which the Second Circuit characterized as enunciating a new constitutional rule. See 724 F.2d at 280. In St. Pierre v. Helgemoe, 545 F.2d 1306 (1st Cir. 1976), the First Circuit's decision was predicated on its acceptance of petitioner's claim that the Supreme Court's intervening decision in Henderson v. Morgan, 426 U.S. 637, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976) "works a significant retroactive change in the law." See 545 F.2d at 1309.

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) approving and adopting

this Report and Recommendation; (2) denying respondent's Motion to Dismiss; and (3) requiring respondent to serve and file an Answer on the merits to the First Amended Petition within 30 days.

DATED: March 7, 2007

/S/
ROBERT N. BLOCK
UNITED STATES MAGISTRATE JUDGE

APPENDIX H

COURT OF APPEAL - SECOND DIST.
FILED
SEP 28 2005
JOSEPH A. LANE, Clerk
Deputy Clerk

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. FRANK BUTLER, Defendant and Appellant.	2d Crim No. B167710 (Super. Ct. No. MA023026) (Los Angeles County)

The California Supreme Court granted review of our prior decision filed September 22, 2004. In compliance with

the Court's decision in *People v. Black* (2005) 35 Cal.4th 1238 we issue this opinion.

Frank Butler appeals a judgment after conviction by jury verdict of corporal injury to a spouse, count I (Pen. Code,[1] § 273.5, subd. (a)) and assault with a deadly weapon (§ 245, subd. (a)(1)) with findings that he inflicted great bodily injury and personally used a deadly weapon, count II (§§ 12022.7, subd. (a), 12022, subd. (b)(1)). Butler's counsel did not object to photographs depicting blood stains on the victim and at the crime scene. Neither did he request a supplemental probation report. We conclude this does not establish ineffective assistance of counsel. The court's imposition of the high term of four years on count I, corporal injury to a spouse, based on factual findings it made without a jury did not implicate Butler's Sixth Amendment right to a jury trial. We affirm.

FACTS

Daria Butler, Butler's wife, testified that she had an argument with Butler. While standing behind her, he struck her on the head with an iron. She said, "I was cowering down to get away from him . . . the blows kept coming." Daria called the police. She said she gave "them as much of a statement as I could before the paramedics came to bandage me up and take me to the hospital."

Butler testified that Daria attacked him with a knife. In self-defense he hit her with an iron "three or four [times] before the iron broke." He said Daria did not appear to be wounded.

In rebuttal, Laquan Butler, Butler's son, testified that he came into the room after the incident and saw no knife. Barbara Butler, Laquan's sister, testified that when she

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1. All statutory references are to the Penal Code unless otherwise stated.

entered the room she saw blood everywhere. She did not see a knife.

Without objection, the prosecution introduced several enlarged photographs showing the trail of Daria's blood at various places at the crime scene. The photographs also depicted injuries to her hand and head.

Post Trial Proceedings

After the jury verdict William Clark, Butler's counsel, advised the court, "we have an old probation report." The court asked, "Do you want that brought up to date with an interview perhaps of your client?" Clark responded, "I think we can use the probation report that we have."

At the sentencing hearing, Clark requested that the court place Butler on probation. He said, "His entire adult record consists of a 23103 wet reckless conviction [in] 2001. He has no other adult record, no apparent juvenile record of any kind." "At the time of his arrest . . . he was gainfully employed . . . ." He said Butler was not a "threat upon the community," was a "good citizen" and the incident with Daria was "unique." He claimed that aside from the current offense, Butler had otherwise complied with his probation conditions.

The probation report stated as a mitigating factor Butler's insignificant record. It recommended no probation and a prison sentence with "a mid-base term."

The court found "this is certainly not a case for probation due to the seriousness of the crime . . . ." It found as a factor in mitigation Butler's lack of a significant prior record. It found a factor in aggravation the "vulnerability" of Daria and that Butler attacked her from behind. It imposed the high term of four years on the corporal injury to a spouse count. It imposed consecutive sentences of three years for the great bodily injury finding and one year for the deadly weapon enhancement. It

stayed the sentence on the assault with a deadly weapon count.

DISCUSSION

I. *Ineffective Assistance of Counsel*

A. The Photographs

Butler states that at trial the prosecution introduced "large color printouts" depicting "blood splattered over the doors, the carpet, a fan and the wall." He contends his counsel was ineffective because he did not object to this "inflammatory and extremely graphic" evidence.

To prove ineffective assistance of counsel, Butler must show 1) his counsel's performance was deficient; and 2) there was a reasonable probability of a different result but for that performance. (*People v. Quinn* (2001) 86 Cal.App.4th 1290, 1295; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

"The decision whether to object to evidence at trial is a matter of tactics and, because of the deference accorded such decisions on appeal, will seldom establish that counsel was incompetent." (*People v. Lucas* (1995) 12 Cal.4th 415, 444.) "'[T]he mere fact that counsel, had he [or she] chosen another path, "might" have convinced the court to issue a favorable evidentiary ruling, is not enough to carry defendant's burden of demonstrating [incompetence] . . . .' [Citations.]" (*Id.* at p. 445.)

Here Clark could have reasonably concluded that an objection would fail. The witnesses gave different versions of this incident. Butler testified that Daria did not appear to be wounded. The photographs rebut that testimony. (*People v. Heard* (2003) 31 Cal.4th 946, 976.) Crime scene photographs are admissible to show the "nature of the attack." (*Ibid.*) "'"[T]he prosecution was not obliged to prove these details solely from the testimony of live

witnesses . . . .'"" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1216.) The prosecution also alleged great bodily injury. "[T]he photographs were probative of [those] allegations . . . ." (*People v. Heard, supra*, at p. 976.) Enlarged photographs may properly assist the jury. (*People v. Carrera* (1989) 49 Cal.3d 291, 328-329.)

Butler contends Clark should have objected on the ground that the probative value of the pictures was substantially outweighed by the undue prejudice to him. (Evid. Code, § 352.) But Butler has not shown that the photographs were unduly prejudicial. Where testimony establishes a brutal offense, courts should not presume the average juror is incapable of "dispassionately evaluating" photographs which corroborate the testimony. (*People v. Thompson* (1992) 7 Cal.App.4th 1966, 1973-1974.) The photographs also corroborated Barbara Butler's testimony that there was blood "everywhere." Moreover, we have reviewed the pictures and conclude that a reasonable juror would not be "unduly influenced by them." (*Id.* at p. 1974.)

B. The Probation Report

Butler contends that the record establishes that Clark was ineffective because he did not request a supplemental probation report.

He claims Clark failed to request the report due to neglect, not strategy. He says his lawyer "had not conducted any investigation to determine whether there was any additional mitigating factor in [Butler's] favor." Butler "believes" Clark did not "forward . . . letters of reference to the Court." But he does not cite to the record and bases his claims on matters outside of it. That is insufficient to support an argument on appeal. (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282-283.) But even so, Clark mentioned a series of favorable and mitigating factors at the sentencing hearing. The court considered

that information but concluded that those factors would not change the sentence. Favorable letters do not support a reduced sentence where the "qualities spoken of in letters were contradicted by defendant's conduct in committing crimes." (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1265.) Butler has not produced the letters and therefore has not shown how they would change the result.

Butler speculates that a new probation report would have been favorable had Clark requested one. "But speculation does not support a claim of ineffective assistance." (*People v. Quinn, supra*, 86 Cal.App.4th at p. 1295.) Where the record on appeal is inadequate, as here, the defendant must raise the ineffective assistance claim in a habeas proceeding. (*People v. Mendoza Tello, supra*, 15 Cal.4th at p. 265.) Butler on this record has not shown ineffective assistance.

II. *The Sentence*

Butler contends that the court erred by sentencing him to the upper term by making findings on aggravating sentencing factors which were not tried by a jury. We disagree. In *People v. Black* (2005) 35 Cal.4th 1238 the California Supreme Court decided the effect of the United States Supreme Court decisions in *United States v. Booker* (2005 __ U.S. __ [125 S.Ct. 738], *Blakely v. Washington* (2004) 542 U.S. 296 and *Apprendi v. New Jersey* (2000) 530 U.S. 466, on California's determinate sentencing law. *People v. Black* held that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*People v. Black, supra*, 35 Cal.4th at p. 1244.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

COFFEE, J.

Martin L. Herscovitz, Judge

Superior Court County of Los Angeles

David R. Denis for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, William T. Harter, Supervising Deputy Attorney General, Myung J. Park, Deputy Attorney General, for Plaintiff and Respondent.

APPENDIX I

SUPREME COURT
FILED
SEP - 7 2005
Frederick K. Ohlrich Clerk

Deputy

Court of Appeal, Second Appellate District,
Division Six - No. B167710

S128657

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

FRANK BUTLER, Defendant and Appellant.

The above-entitled matter is transferred to the Court of Appeal, Second Appellate District, Division Six, with directions to vacate its decision and to reconsider the cause in light of *People* v. *Black* (2005) 35 Cal.4th 1238 (Cal. Rules of Court, rule 29.3(d).)

George
Chief Justice

Kennard
Associate Justice

Baxter
Associate Justice

Werdegar
Associate Justice

Chin
Associate Justice

Associate Justice

Moreno
Associate Justice

APPENDIX J

COURT OF APPEAL - SECOND DIST.
FILED
SEP 22 2004
JOSEPH A. LANE, Clerk
Deputy Clerk

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. FRANK BUTLER, Defendant and Appellant.	2d Crim No. B167710 (Super. Ct. No. MA023026) (Los Angeles County)

Frank Butler appeals a judgment after conviction by jury verdict of corporal injury to a spouse, count I (Pen.

Code,[1] § 273.5, subd. (a)) and assault with a deadly weapon (§ 245, subd. (a)(1)) with findings that he inflicted great bodily injury and personally used a deadly weapon, count II (§§ 12022.7, subd. (a), 12022, subd. (b)(1)). Butler's counsel did not object to photographs depicting blood stains on the victim and at the crime scene. Neither did he request a supplemental probation report. We conclude this does not establish ineffective assistance of counsel. The sentence was erroneous under compulsion of *Blakely v. Washington* (2004) __ U.S. __ [124 S.Ct. 2531]. The court imposed the high term of four years on count I, corporal injury to a spouse, based on factual findings it made without a jury. We reverse and remand for resentencing.

FACTS

Daria Butler, Butler's wife, testified that she had an argument with Butler. While standing behind her, he struck her on the head with an iron. She said, "I was cowering down to get away from him . . . the blows kept coming." Daria called the police. She said she gave "them as much of a statement as I could before the paramedics came to bandage me up and take me to the hospital."

Butler testified that Daria attacked him with a knife. In self-defense he hit her with an iron "three or four [times] before the iron broke." He said Daria did not appear to be wounded.

In rebuttal, Laquan Butler, Butler's son, testified that he came into the room after the incident and saw no knife. Barbara Butler, Laquan's sister, testified that when she entered the room she saw blood everywhere. She did not see a knife.

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1. All statutory references are to the Penal Code unless otherwise stated.

Without objection, the prosecution introduced several enlarged photographs showing the trail of Daria's blood at various places at the crime scene. The photographs also depicted injuries to her hand and head.

Post Trial Proceedings

After the jury verdict William Clark, Butler's counsel, advised the court, "we have an old probation report." The court asked, "Do you want that brought up to date with an interview perhaps of your client?" Clark responded, "I think we can use the probation report that we have."

At the sentencing hearing, Clark requested that the court place Butler on probation. He said, "His entire adult record consists of a 23103 wet reckless conviction [in] 2001. He has no other adult record, no apparent juvenile record of any kind." "At the time of his arrest . . . he was gainfully employed . . . ." He said Butler was not a "threat upon the community," was a "good citizen" and the incident with Daria was "unique." He claimed that aside from the current offense, Butler had otherwise complied with his probation conditions.

The probation report stated as a mitigating factor Butler's insignificant record. It recommended no probation and a prison sentence with "a mid-base term."

The court found "this is certainly not a case for probation due to the seriousness of the crime . . . ." It found as a factor in mitigation Butler's lack of a significant prior record. It found a factor in aggravation the "vulnerability" of Daria and that Butler attacked her from behind. It imposed the high term of four years on the corporal injury to a spouse count. It imposed consecutive sentences of three years for the great bodily injury finding and one year for the deadly weapon enhancement. It stayed the sentence on the assault with a deadly weapon count.

DISCUSSION

I. *Ineffective Assistance of Counsel*

A. The Photographs

Butler states that at trial the prosecution introduced "large color printouts" depicting "blood splattered over the doors, the carpet, a fan and the wall." He contends his counsel was ineffective because he did not object to this "inflammatory and extremely graphic" evidence.

To prove ineffective assistance of counsel, Butler must show 1) his counsel's performance was deficient; and 2) there was a reasonable probability of a different result but for that performance. (*People v. Quinn* (2001) 86 Cal.App.4th 1290, 1295; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

"The decision whether to object to evidence at trial is a matter of tactics and, because of the deference accorded such decisions on appeal, will seldom establish that counsel was incompetent." (*People v. Lucas* (1995) 12 Cal.4th 415, 444.) "'[T]he mere fact that counsel, had he [or she] chosen another path, "might" have convinced the court to issue a favorable evidentiary ruling, is not enough to carry defendant's burden of demonstrating [incompetence] . . . .' [Citations.]" (*Id.* at p. 445.)

Here Clark could have reasonably concluded that an objection would fail. The witnesses gave different versions of this incident. Butler testified that Daria did not appear to be wounded. The photographs rebut that testimony. (*People v. Heard* (2003) 31 Cal.4th 946, 976.) Crime scene photographs are admissible to show the "nature of the attack." (*Ibid.*) "'"[T]he prosecution was not obliged to prove these details solely from the testimony of live witnesses . . . ."'" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1216.) The prosecution also alleged great bodily injury. "[T]he photographs were probative of [those]

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II. *The Sentence*

The sentence, however, is erroneous. The trial court imposed the high term of four years for the conviction of the corporal injury to a spouse, count I. It made factual findings to support the upper term sentence. But there were no jury findings on those sentencing issues. That violated Butler's constitutional right to a jury trial on the factors which supported the higher sentence. (*Blakely v. Washington*, *supra*, __ U.S. __ [124 S. Ct. 2531].)

The sentence is reversed so that Butler be resentenced consistent with *Blakely*. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

COFFEE, J.

Martin L. Herscovitz, Judge

Superior Court County of Los Angeles

David R. Denis for Defendant and Appellant.

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